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ADMINISTRATIVE APPEAL OF MARLIN D. KUYKENDALL

v.

PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, AND YAVAPAI-PRESCOTT TRIBE

8 IBIA 76

Decided *June 2, 1980*

Appeal from decision by Area Director permitting lease of Indian trust lands to be cancelled by tribe without approval of the Secretary.

Reversed.

1. Indian Lands: Leases and Permits: Long-term Business/Agriculture: Cancellation

Where a business lease between tribe and automobile dealer contains a cancellation clause providing for alternative remedies in case of breach of the agreement by lessee, use of the phrase "and/or" in reference to the various alternatives cannot reasonably be construed to be a delegation to the tribe of Secretarial authority to cancel the lease in the event of breach of the lease by the lessee. Nor does the existence of alternative remedies in the lease constitute Secretarial consent that the tribe undertake to administer the lease without agency participation contrary to Departmental regulations.

2. Indian Lands: Leases and Permits: Long-term Business/Agriculture: Cancellation

Where Departmental regulations at 25 CFR Part 131 are incorporated by reference as part of the lease, those regulations are to be applied in the administration of the lease as though fully set out in the written lease agreement. The regulations incorporated into the lease become binding upon the parties. The agency may not ignore nor act contrary to the provisions of the incorporated regulations which require Secretarial consent to cancellation of the lease, subject to certain specified due process requirements set out in the regulations.

3. Indian Lands: Leases and Permits: Long-term Business/Agriculture: Cancellation

A collateral attempt by a tribal court to cancel appellant's lease by entry of a declaratory judgment that appellant "materially breached the lease" is ineffective to result in cancellation since the judgment goes beyond the subject matter jurisdiction of the court to enforce.

APPEARANCES: Thomas J. Reilly, Esq., for appellant; Robert Moeller, Esq., for appellee, Commissioner of Indian Affairs; Philip E. Toci, Esq., for appellee, Yavapai-Prescott Tribe.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

INTERIOR BOARD OF INDIAN APPEALS

Factual and Procedural Background

On Sept. 11, 1969, the Superintendent of the Truxton Canyon Agency executed a lease on behalf of the Yavapai-Prescott Community Association with Appellant Kuykendall for a tract of land in Prescott, Arizona, to be used for an automobile agency. The lease incorporates 25 CFR Part 131 by refer-

ence, and provides, in the default provisions of the lease, for 30- and 60-day grace periods, following notice of default, during which time appellant shall be permitted to cure any claimed breach of the lease before termination may be sought.[1]

Appellant's initial performance under the lease became the cause for several notices in 1970 and 1971 from the Agency Superintendent that there was failure to make timely survey, failure to provide a plat on time, failure to pay rent on time, failure to show proof of insurance, and failure to begin construction as scheduled. By late 1971, however, it appears the initial problems had been overcome; appellant had built a $200,000 garage building on the leased land; the land had been surveyed and found to contain 4 instead of 2 acres.[2] A plat had been furnished, and insurance premiums and rents were being paid.

In 1975 appellant subleased the auto business to Jay Piccinati, without, apparently, any prior consultation with the tribe.[3]

In October 1975, the Agency Superintendent gave appellant notice his sublease to Piccinati was considered to be a breach of his lease with the tribe. The matter was negotiated and finally settled. Also in 1975 the tribe enacted a sales tax ordinance which taxed retail sales on the reservation. In 1977 Piccinati returned the auto business on the leased land to appellant, who during the time of the Piccinati operation had failed to make the agreed lease payments for September 1976, and had failed to make an interest payment claimed to be due on late rents. Appellant had charged Piccinati $2,400 monthly rent, during part of the sublease, although he informed the tribe the rent was to be $1,400.[4]

In March 1979 the partnership of Smith and Henkel subleased the auto business from appellant. Preliminary negotiations involved obtaining the approval of the new operators by the auto manufacturers concerned. While this transaction was going on, appellant claims to have notified the tribal business manager of the proposed sublease and the negotiations for the sale of the business. The manager, however, denies that he was told about the sale and new sublease. Smith and Henkel agreed to pay Appellant Kuykendall $200,000 for the business, subject to tribal approval of the sublease, with the understanding appellant would remain primarily liable for the lease payments and would continue to deal with the tribe concerning the lease.

On Mar. 9, 1979, a form of sublease was presented by appellant to the tribe for approval. The tribe refused to approve the sublease, and demanded more information about the partners, which was supplied. When the tribe discovered that Smith and Henkel had formed

[1] 25 CFR 131.14 provides the lessee shall have a "reasonable" cure time.

[2] Resulting in a doubling of the lease payments to $1,600 from $800.

[3] The former association is now a tribe. 45 FR 27828 (Apr. 24, 1980).

[4] The tribe takes the position it is entitled to charge sales tax on the rental. It claims $3,000 due on this account.

a corporation (primarily for tax purposes), it refused to approve the sublease for that stated reason.

On Apr. 6, 1979, the tribe informed appellant the sublease was disapproved, and notified him the sublease was a breach of the lease with the tribe. He was notified that, to cure the breach, he must remove Smith and Henkel and retake the dealership himself. Also on April 6 the tribe notified Smith and Henkel they were in wrongful possession of tribal land. They were given 15 days to obtain an approved sublease or be removed from the land.

On May 16, 1979, the tribe agreed that Smith and Henkel should remain in possession of the leased land; on June 6, 1979, however, they were again notified to quit the property.

On June 27, 1979, appellant was notified by the tribal attorney that his lease with the tribe was terminated. On Sept. 11, 1979, appellant made his annual lease payment to the Truxton Canyon Agency; it was accepted, but later returned.[5] Prior to this transaction, on Aug. 30, 1979, the Area Director had opined in writing that the lease cancellation by the tribe was validly done and was "not subject to our intervention or to our administrative determination."[6]

On Sept. 20, 1979, the tribe approved a law and order code creating a tribal court, which the Truxton Canyon Agency Superintendent approved the same day. An undated form of small claim summons and complaint was served on appellant on Oct. 24, 1979, summoning him to a trial in the newly constituted tribal court on Nov. 26, 1979, in an action brought against him by his sublessees Smith and Henkel for declaratory judgement. Appellant refused to appear, but instead chose to challenge the jurisdiction of the court, questioning that it was properly constituted by appealing from the Superintendent's order of September 20, which approved the code and established the court. Finding Kuykendall in default, the tribal court on Feb. 1, 1980, ordered the improvements on the leased land (the $200,000 auto agency) "forfeited." The Smith-Henkel sublease with Kuykendall was declared "a nullity," and any possessory right of Smith and Henkel was found to depend upon the will of the Yavapai-Prescott Tribe.[7]

[5] A memo in the file indicates that this was not a lapse on the part of the agency. The matter was apparently decided only after consultation with Area Director's office.

[6] The appeal is taken from that determination.

[7] Earlier, the U.S. District Court for Arizona, in *Kuykendall* v. *McGee*, Civ. No. 79–834 (D. Ariz. Jan. 28, 1980), found that appellant had failed to exhaust his administrative remedies with the Department concerning the lease termination, and dismissed his action for declaratory judgment and injunction against the tribe. In dicta in his order, the Judge assumes the lease provides a clause permitting terminations by the tribe. Since he directly finds, however, in support of his judgment, that appellant failed to exhaust his administrative remedy and that the lease properly incorporates the termination provisions of 25 CFR

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Issue on Appeal

On May 8, 1980, this Board determined the interest of administrative economy would be best served by resolution of the apparent threshold issue: Whether a business lease granted by an Indian tribe with approval of the Secretary pursuant to the provisions of 25 U.S.C. § 415 (1976), may be terminated by the tribe without Secretarial approval or action. The Board finds that the lease may not be cancelled without Secretarial approval.

Discussion and Conclusions

[1] The first paragraph of the Sept. 11, 1969, lease provides:

> THIS CONTRACT is made and entered into this 11th day of September, 1969, by and between *The Yavapai-Prescott Community Association* hereinafter called the Lessor, whose address is *P.O. Box 1390, Prescott, Arizona,* and *Marlin D. Kuykendall,* hereinafter called the Lessee, whose address is *P.O. Box 911, Prescott, Arizona,* under the provisions of the Act of August 9, 1955 (69 Stat. 539) as implemented by Part 131, Leasing and Permitting, of the Code of Federal Regulations, Title 25—Indians, and any amendments thereto which by reference are made in part hereof. [Italics in original.]

The incorporation by reference of regulations into Federal contracts is an established procedure in Government contracting. Such provisions in Government contracts are upheld by the courts, which recognize the practice to be binding upon the contracting parties.[8] One of the incorporated regulations, 25 CFR 131.14, requires that termination for breach of a lease entered into under authority of the regulations appearing at Part 131 is subject to Secretarial approval.[9]

Despite the requirements of 25 CFR 131.14, the Yavapai-Prescott Tribe, relying upon numbered Clause 30, DEFAULT, of the September lease, argues that the Secretary delegated to the tribe the power to cancel the lease when language was inserted into the lease in Clause 30 that "then Lessor and/or the Secretary may either * * * [elect to

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Part 131, this apparent inconsistency properly refers only to the issues respecting tribal sovereignty raised in the Federal case. To find otherwise would make the court's holding meaningless, since the issue referred to this agency (whether this lease was terminated) would otherwise have been decided by the District Court.

[8] *Cafeteria and Restaurant Workers Union, Local 473, AFL–CIO* v. *McElroy,* 367 U.S. 886 (1961); *Rehart* v. *Clark,* 448 F.2d 170 (1971) (for a decision holding applicable regulations to apply to a Government contract, even though not actually incorporated by specific reference, *see G. L. Christian and Assoc.* v. *United States,* 312 F.2d 418, 427, *rehearing denied,* 160 Ct. Cl. 58, (1963), *cert. denied,* 375 U.S. 954 (1963), *rehearing denied,* 376 U.S. 929 (1964)).

[9] *See also* 25 CFR 131.5 and 131.12 for further limitations concerning leasing and the power of the Secretary, generally. The statute implemented by these regulations, the Act of Aug. 9, 1955, 69 Stat. 539, 25 U.S.C.A. § 415 (West Supp. 1980), provides in pertinent part:

> "(a) Any restricted Indian lands, * * * tribally * * * owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for * * * business purposes, * * * as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land * * * on the * * * Yavapai-Prescott Community Reservation * * * which may be for a term of not to exceed ninety-nine years, * * *. Leases for * * * business purposes * * * may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior."

pursue a number of alternative remedies]." [10]

Both the Yavapai-Prescott Tribe and the Phoenix Area Director argue that the language in Clause 30 constitutes a delegation of Secretarial authority to the tribe to cancel the lease for default in the performance of the lessee.[11] It is difficult, in view of the general tenor of the lease document,[12] to accept

[10] Numbered Clause 30 provides:

"30. DEFAULT

"Time is declared to be of the essence of this lease. Should Lessee default in any payment of monies or fail to post bond, as required by the terms of this lease, and if such default shall continue uncured for the period of thirty (30) days after written notice thereof by the Lessor or the Secretary to Lessee, during which 30-day period Lessee shall have the privilege of curing such default, or should Lessee breach any other covenant of this lease, and if such breach shall continue uncured for a period of sixty (60) days after written notice thereof by the Lessor or the Secretary to Lessee, during which 60-day period Lessee shall have the privilege of curing such breach, then Lessor and/or the Secretary may either:

"A. Collect by suit or otherwise, all monies as they become due hereunder, or enforce, by suit or otherwise, Lessee's compliance with any other provisions of this lease, or

"B. Re-enter the premises and remove all persons and property therefrom excluding the personal property belonging to authorized sublessees, and either

"(1) Re-let the premises without terminating this lease, as the agent and for the account of Lessee, but without prejudice to the right to terminate the lease thereafter, and without invalidating any right of Lessor and the Secretary or any obligation of Lessee hereunder. Terms and conditions of such re-letting shall be at the discretion of Lessor and the Secretary, who shall have the right to alter and repair the premises as they deem advisable, and to re-let with or without any equipment or fixtures situated thereon. Rents from any such re-letting shall be applied first to the expense of re-letting, collecting, altering, and repairing, including attorney's fees and any real estate commission actually paid, insurance, taxes and assessments and thereafter toward the payment to liquidate the total due. Lessee shall pay to Lessor monthly, when due any deficiency, and Lessor and the Secretary may sue thereafter as each monthly deficiency shall arise.

"(2) Terminate this lease at any time and even though Lessor and the Secretary have exercised rights as outlined in (1) above. Exercise of this remedy shall exclude recourse to any other remedy, but shall not preclude recovery of amounts due to Lessor for the period prior to termination.

"C. Take any other action deemed necessary to protect any interest of Lessor. No waiver of a breach of any of the covenants of this

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lease shall be construed to be a waiver of any succeeding breach of the same or any other convenant.

"Any action taken or suffered by Lessee as a debtor under any insolvency or bankruptcy act shall constitute a breach of this lease. In such event, the Lessor and the Secretary shall have the options set forth in sub-articles (1) and (2) herein, and furthermore, the Lessor is hereby declared to be a first preferred creditor, except as provided in Article 22."

[11] The Area Director argues at page 5 of his answer dated Nov. 9, 1979, that the use of the words "and/or the Secretary" are a delegation to the tribe of the power to cancel the lease, and, at page 6, observes that, "Nothing in 25 USC 415 prohibits the Secretary, through lease terms which he approves and has approved in the subject lease, from authorizing the tribe to terminate the lease for cause." The position taken by the tribe is more complex. The tribe assumes a delegation of Secretarial power and seeks to make the theory of tribal sovereignty dispositive of the issue here by stating the issue in the case to be:

"May an organized Indian tribe recognized by both Congress and the Secretary of the Interior, acting under a lease of tribal property which has been negotiated and approved by the Secretary of the Interior, exercise its sovereignty and right of self determination by terminating such lease for a material and substantial breach thereof by the lessor, in accordance with the terms of the lease, or is the sovereignty and self determination of the Tribe limited to the exclusive remedy of requesting the Secretary of the Interior to act in behalf of the Tribe by proceeding under the provisions of 25 CFR 131.14?" (Answer of the tribe dated Nov. 9, 1979, at page 4.)

[12] Clause 7 recites that the Secretary is the agent of the tribe for purposes of the lease; payments are to be made to the Secretary. Clause 8 provides accounting under the lease shall be made to the Secretary and tribe, jointly. Clause 10 provides that plans shall be jointly approved by the tribe and the Sec-

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their assumption that the use of the words "and/or" in Clause 30 constituted a delegation of Secretarial authority to administer leased trust property contrary to Departmental regulations. The fiduciary relationship of the Secretary to the tribe in such matters is fixed by the regulations required by statute [13] and defined by case law.[14] The phrasing of the second sentence of Clause 30, upon which the tribe relies for its stated position, while awkward, merely refers to the alternative actions to be taken to pursue the various remedies described in Clause 30 which are jointly available to the Secretary and the tribe. Nothing in the language used suggests the Secretary planned to terminate the trust relationship or relinquish the administration of the trust property to the tribe in the event appellant should default. Moreover, the conduct of the parties during the early administration of the lease confirms that the Secretary was not excused from his trust duties by defaults in the lease, but rather he was then required to administer the contract according to the terms respecting default.[15]

[2] Even had the Secretary wished to pursue such a course, he would have been prevented from doing so by the Departmental regulations appearing at 25 CFR Part 131. The agency is bound by its own regulations: Especially where these regulations insure that private citizens directly affected by Government action shall not be deprived of their interests without the due process protections furnished by the agency regulations.[16] In this situation appellant lessee of Indian land claims, correctly, that his lease cannot be cancelled except in conformity to the provisions of 25 CFR 131.14, which, in addition to due process safeguards concerning notice, includes a right of appeal to the Commissioner of Indian Af-

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retary. Clause 12 provides that major construction shall be jointly approved. Clause 16 provides that required bonds shall be deposited with the Secretary. Clause 17 provides that a construction bond, in a form suitable to the Secretary may be required and that joint approval by the tribe and Secretary will be required prior to obligation of building loan agreements. Clause 19 requires joint approval of subleases. Clause 22 requires joint approval prior to encumbrancing. Clause 24 requires proof of payment to lienors to be furnished jointly to the tribe and Secretary. Clause 26 agrees to hold the tribe and the United States harmless from casualty claims. Clause 29 describes the effect arbitration under the lease may have upon actions by the Secretary. Clause 35 provides that all lessees' obligations under the lease are jointly owed to the tribe and the United States, so long as the land continues in trust status. Clause 41 provides for joint inspection of the leased premises by the tribe and the Secretary.

[13] 25 U.S.C. § 145 (1976).

[14] *See United States* v. *Jim*, 409 U.S. 80 (1972); *United States* v. *Shoshone Tribe of Indians*, 304 U.S. 111 (1938); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831).

[15] From 1969 until 1978, notices to cure were given by the Superintendent. Thus, deficiency notices were sent by the Bureau of Indian Affairs (BIA) to appellant Apr. 20, 1970; Jan. 14, 1971; Jan. 22, 1971; Sept. 25, 1975; Dec. 7, 1976; and Dec. 30, 1976. The tribe's reaction to the sublease to Smith-Henkel in 1978 provided the first indication that the Sept. 11, 1969, lease was not regarded by the tribe as subject to BIA administration. For 9 years of the lease, however, the agency administered the lease for the tribe, and the tribe acquiesced in that arrangement.

[16] *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954); *United States* v. *Heffner*, 420 F.2d 809 (4th Cir. 1969).

fairs and to this Board.[17] (Suggestion is made in the record before the Board that the regulations could and should be amended by the BIA to provide for administration of business leases by the tribe. See Transcript of Tribal Court Proceedings in *Smith and Henkel* v. *Yavapai-Prescott Community* at 87–91. Notwithstanding the possible merits of this suggestion, the Board is bound by the regulations now in force.)

[3] This matter must necessarily be returned to the Phoenix Area Director for regular administration of the lease between the parties. The collateral attempt by the tribal court to cancel appellant's lease by entry of a declaratory judgment that appellant "materially breached the lease" [18] was ineffective in and of itself to result in cancellation since the judgment went beyond the subject matter jurisdiction of that court to enforce. Pursuant to 25 CFR 131.14, promulgated by the Secretary in response to 25 U.S.C. § 415 (1976), the Department is vested with final cancellation authority over business leases of trust land.[19] This holding is not a novel position for the Department, but rather follows past decisions of the Secretary concerning lease cancellations.[20]

Decision

The Aug. 30, 1979, determination by the Phoenix Area Director that the Yavapai-Prescott Tribe was authorized to cancel appellant's lease with the Yavapai-Prescott Tribe without the approval of the Secretary is set aside. This matter is remanded to the Area Director with instructions to administer the lease pursuant to the provisions of 25 CFR Part 131 and the lease agreement of Sept. 11, 1969.[21]

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[17] 25 CFR 2.18, 2.19.

[18] Although there is much in the record concerning the handling of the subleases of the auto dealership (including the transcript of the tribal court proceedings), there is no description of any damage to the tribe caused by the two subleases made by appellant since 1969. The Area Director will need to consider whether there was in fact any breach in this case where it affirmatively appears the sublessees were acceptable to the tribe. He will also need to consider whether the subleases were commercially reasonable and in the best interest of the tribe.

[19] *See Bledsoe* v. *United States*, 349 F. 2d 605, 607 (10th Cir. 1965).

[20] Prior decisions of this Board, which are final for the Department, have recognized that leases of tribally owned trust land effectuated under provisions of 25 CFR Part 131 may not be cancelled without Departmental approval. *See Merrill Karlen* v. *Commissioner*, 6 IBIA 181 (1977); *Benjamin D. Vieau* v. *Commissioner*, 6 IBIA 150 (1977); *Alton K. Brown* v. *Albuquerque Area Director*, 5 IBIA 155 (1976). In a related subject area, it is recognized that cancellation of rights–of–way over tribally owned trust land requires Departmental action. *See* 25 CFR Part 161. This requirement is provided by regulation even though the governing statutes, 25 U.S.C. §§ 323–324 (1976), expressly address only the authority of the Secretary to grant such rights–of–way. *See Whatcom County Park Board* v. *Portland Area Director*, 6 IBIA 196, 84 I.D. 938 (1977); *Brown County, Wisconsin*, 2 IBIA 320 (1974).

[21] Although this entire matter appears to have been fully presented for decision, final acton by the Board is not possible since there has been no agency decision on the merits. While the decision reviewed (that the Area Director was without authority to act) is set aside, the question concerning the propriety of the lease cancellation remains yet to be decided. This is a matter for the agency to decide, subject to a further right of appeal to the Commissioner and the Board.

This decision is final for the Department.

FRANKLIN ARNESS
Administrative Judge

WE CONCUR:

WM. PHILIP HORTON
Chief Administrative Judge

MITCHELL J. SABAGH
Administrative Judge

DRUMMOND COAL CO.

2 IBSMA 96

Decided *June 3, 1980*

Petition for discretionary review by the Office of Surface Mining Reclamation and Enforcement from a November 7, 1979, decision by Administrative Law Judge David Torbett vacating Notice of Violation No. 78–II–17–15 (Docket No. NX 9–83–R).

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: In Connection With—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface coal mining operations." Where a coal processing facility is ownd by the same company that owns all the mines that supply coal to it, that facility may conduct activities "in connection with" a surface coal mine within the meaning of "surface coal mining operations" in 30 CFR 700.5.

2. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: At or Near a Minesite—Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface coal mining operations." Where a coal processing facility is functionally and economically integrated with several neighboring surface coal mines but is 9 miles distant from the closest of those mines, that facility may be "near" a minesite within the meaning of "surface coal mining operations" in 30 CFR 700.5.

APPEARANCES: William B. Long, Esq., and Richard E. Dick, Esq., for Drummond Coal Company, Jasper, Tennessee; John P. Williams, Esq., Office of the Field Solicitor, Knoxville, Tennessee, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Factual and Procedural Background

On Dec. 8, 1978, the Office of Surface Mining Reclamation and Enforcement (OSM) inspected Drummond Coal Company's (Drummond) coal processing facility, known as the Sayre Processing Plant, in Jefferson County, Alabama, and issued Notice of Violation No. 78–II–17–15 pursuant to sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977.[1] The notice contained two vio-

[1] Act of Aug. 3, 1977, 91 Stat. 445, 505, 30 U.S.C. § 1271(a)(3) (Supp. I 1977).

lations, allegedly failing to pass all surface drainage from the processing plant through a sedimentation pond and allegedly discharging surface and ground water into underground mine workings, both in violation of 30 CFR 715.17.

On Dec. 27, 1978, Violation No. 2 was vacated by OSM. The next day Violation No. 1 was terminated. Subsequently, OSM issued a proposed assessment of a civil penalty. Pursuant to 30 CFR 723.17 Drummond requested a conference with OSM to review the assessment. On July 3, 1979, OSM notified Drummond that it was eliminating the civil penalty. The following week Drummond filed a "Petition or Application for Review." On July 31, 1979, OSM filed an answer and a motion to dismiss the "Petition or Application." As grounds for the motion, OSM stated that if the document filed by Drummond were considered an application for review it should be dismissed as not having been filed within 30 days of receipt of the notice, as required by 43 CFR 4.1162. OSM argued in the alternative that if the filing were considered to be a petition for review of a proposed assessment of a civil penalty, the petition should be dismissed because Drummond was not a "person charged with a civil penalty" pursuant to 43 CFR 4.1150.

At the hearing on Sept. 26, 1979, the Administrative Law Judge denied the motion to dismiss. He considered the document filed by Drummond to be a petition for review, that it was timely filed, and that Drummond had a right to file it, despite the fact that no penalty was assessed (Tr. 8). The hearing continued and at the conclusion of OSM's presentation of its case, Drummond moved to vacate the notice of violation because OSM had failed to show that Drummond's coal processing plant was subject to the Act and, therefore, OSM lacked jurisdiction over Drummond's facility. The Administrative Law Judge granted the motion and vacated the notice of violation. On Nov. 7, 1979, he issued a written confirmation of his oral decision.

OSM filed a document captioned "Notice of Appeal" with the Board on Dec. 7, 1979. OSM requested that if the Board determined that no right of appeal was available pursuant to 43 CFR 4.1271, the Board consider the filing to be a petition for discretionary review pursuant to 43 CFR 4.1270. The Board granted the petition on Dec. 28, 1979.

The following facts are undisputed by the parties. Drummond Coal Company owns and operates a coal processing facility known as the Sayre Processing Plant in Jefferson County, Alabama (Tr. 16; Exh. R–4). The activities conducted at the plant included the crushing, cleaning, loading, and processing of coal (Tr. 17–21; Exh. R–4).

All the coal processed at the plant is delivered to it from seven Drummond surface coal mines located 9

to 30 miles from the facility (Exh. R–4). Forty-five percent of the coal processed comes from two mines that are each 9 miles away. The plant is in the northwestern part of Jefferson County near the Jefferson-Walker County line (Tr. 36, 41), and the mines are in the three contiguous Alabama counties of Jefferson, Walker, and Cullman (Tr. 40–41). The trucks which deliver coal from the mines to the processing plants travel over public roads (Tr. 17–18, 39).

The parties agreed that in considering the appeal the Board could draw the following conclusions stated on page 2 of OSM's brief:

> (1) If Drummond's processing plant is found to fall under the definition of "surface coal mining operations" in 30 C.F.R. § 700.5, the violation [Violation No. 1] cited by OSM in Notice of Violation No. 78–II–17–15 did in fact exist on December 8, 1978.
>
> (2) Drummond's processing plant was subject to state regulation within the scope of the interim federal performance standards on December 8, 1978 (Ex. R–5–R–8). [Footnote omitted.]

Issue

Is Drummond's Sayre Processing Plant included under the definition of "surface coal mining operations" in 30 CFR 700.5?

Discussion

Activities encompassed by the definition of surface coal mining operations in 30 CFR 700.5 [2] are those "conducted on the surface of lands *in connection with a surface coal mine.*" (Italics added.) The definition also states that such activities include "the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce *at or near the mine-site:* * * *." (Italics added.) Therefore, for Drummond's coal processing plant to be considered a surface coal mining operation and subject to OSM's jurisdiction it must pass two tests. Its activities must be conducted in connection with a surface coal mine, and the plant must be located at or near the minesite.

[1] The facts in this case are different from those in *Western Engineering, Inc.*, 1 IBSMA 202, 204–205, 86 I.D. 336 (1979). Here the coal processing facility is owned by a company that supplies that facility from several mines owned by the same company. There may be other relationships that would suffice to establish a "connection" between an activity and a surface coal mine, but common ownership and use are an

[2] 30 CFR 700.5 reads in pertinent part: "*Surface coal mining operations* means—

"(a) *Activities conducted on the surface of lands in connection with a surface coal mine or, subject to the requirements of Section 516 of the Act, surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce.* Such activities include excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other procession or preparation, loading of coal for interstate commerce *at or near the mine-site.*" (Italics added.)

adequate basis for finding that an "[a]ctivit[y is] conducted * * * in connection with a surface coal mine."

[2] The next question is whether Drummond's crushing, cleaning, processing and loading activities occur "at or near" a minesite. Since they are not conducted "at" one of Drummond's mines, are they "near" one or more of them? As Black says, "The word ['near'] as applied to space is a relative term without positive or precise meaning, depending for its signification on the subject-matter in relation to which it is used and the circumstances under which it becomes necessary to apply it to surrounding objects." [3] In this case, Drummond's coal processing activities are functionally and economically integrated with the operation of several neighboring mines. It is true that distances of 9 to 30 miles separate the coal processing facility from these mines, but that circumstance alone should not be decisive in light of the context in which the activities at the facility are conducted. The fact of the facility's location in relation to Drummond's mines and the fact that these mines all use that facility outweigh the almost coincidental fact that the closest mine is 9 miles away. Under these circumstances Drummond's coal processing activities are conducted "near" its mines.

WILL A. IRWIN
Chief Administrative Judge

[3] BLACK'S LAW DICTIONARY, at 927 (5th ed. 1979).

ADMINISTRATIVE JUDGE MIRKIN CONCURRING:

In view of the present departmental posture in regard to coal processing facilities, I question seriously whether any good purpose is now served by making the fine distinctions we declared we would make in our remand in *Ross Tipple Co.*, 1 IBSMA 303 (1979).[1] Nevertheless, until the Secretary amends the regulations, we are obligated to construe and apply the existing ones. Perhaps, by not endeavoring to compromise our views as we customarily do, but, instead, by attempting to set forth our separate rationales in this and the series of coal processing cases now pending, we may even prove of some assistance to the Secretary in the promulgation of any final regulation.

In *Western Engineering, Inc., supra*, we had a company that operated a river terminal and acted as a contract handler of coal. Its plant was built originally to load dry bulk commodities onto river barges. It did not own, operate or lease any coal mines. We held that whatever it operated was not a surface coal mining operation as defined in 30 CFR 700.5.

[1] On Mar. 31, 1980, the U.S. District Court for the District of Columbia approved a settlement agreement which, in part, states as follows: "13. Defendant agrees that within 60 days of the effective date of this agreement he will propose a rulemaking to clarify OSM's authority to regulate coal processing facilities during the interim program." The defendant in this case is the Secretary of the Interior. *Council of the Southern Mountains, Inc.* v. *Andrus*, Civ. No. 79-1521 (D.D.C. Mar. 31, 1980).

In the case before us we have a coal processing facility owned and operated by the same company which owns and operates seven surface coal mines located from 9 to 30 miles around the processing plant. The plant processes the coal from those mines and no others (Exh. R–4). The plant's activities are conducted "in connection with a surface coal mine" as set forth in 30 CFR 700.5. (Indeed, these activities are in connection with a series of them.) The only remaining question is whether the plant is also located "at or near the mine-site." It is not "at," which is a fairly definite term. "Near," though, is a relative word whose meaning will depend on the circumstances.[2] Here, we have a complex of mines whose focal point is a processing facility. There is a common owner and operator. Under the circumstances, I have no problem in determining that the processing plant's activities are conducted in connection with a surface coal mine and that it is near the minesite within the definition of 30 CFR 700.5.

MELVIN J. MIRKIN
Administrative Judge

ADMINISTRATIVE JUDGE FRISHBERG DISSENTING:

In *Western Engineering, Inc.*, 1 IBSMA 202, 86 I.D. 336 (1979), this Board analyzed the definition of "surface coal mining operations" and found that because of its "ambiguous quality" and the failure of the legislative history of the Act to clarify the ambiguities, those ambiguities should be resolved in favor of *Western*. The Board also indicated in footnote 10 of that decision in discussing the use of the term "coal processing" in the legislative history of the Act that the physical relationship of the processing plant and the supplying mine is an important consideration. *Id.* at 212, 86 I.D. 341. The footnote reads in pertinent part: "It does not, however, establish that coal processing which does not occur as part of the complex of activities which physically make up a particular coal mine site is governed by the performance provisions of the Act and interim regulations."

There has been no clarification of the definition of surface coal mining operations since the issuance of *Western*. The tests to determine whether a coal processing facility is a surface coal mining operation and, therefore, subject to OSM jurisdiction remain the same. The facility's activities must be conducted in connection with a surface coal mine, and the facility must be located at or near the minesite.

OSM suggests that the Board consider two factors in determining whether there is a "connection" between the activities conducted at the processing facility and those conducted at a surface coal mine. Those factors are: (1) the physical proximity between the processing facility and the mine or mines that supply coal to it; and (2) the extent of common ownership or control over the processing plant and

[2] *See, e.g., J. W. Kelly & Co. v. State*, 123 Tenn. 516, 132 S.W. 193, 201 (1910). Interestingly, this case also contains a definition of "tipple."

the mine or mines that supply coal to it (OSM Brief at 5).

Even assuming that I could accept OSM's argument as the majority does, that common ownership is sufficient to satisfy the connection test, Drummond's facility is not located "at or near the mine-site."

OSM provides little guidance for determining the meaning of "at or near the mine-site" other than to assert that Drummond meets the test. It merely states that "[a]lthough none of Drummond's mines are adjacent to its processing plant, the plant is 'near' all the mines" (OSM Brief at 6). Taking the closest supplying mine to the facility in this case, I am unwilling to hold that a coal processing facility that is 9 miles from a supplying mine is at, or even near, such a mine-site.[1] While I realize the relative nature of the term "near" and that its meaning is dependent upon the circumstances of its use, a coal processing facility located 9 miles from a mine is not proximate to the mine, nor is it close-by, adjacent to, contiguous to, or abutting a mine. It is not "part of the complex of activities which physically make up [that] particular coal mine site." *Western Engineering, Inc., supra.*

[1] "Near" is defined in *Black's Law Dictionary*, at 927 (5th ed. 1979) as:

"Proximate; close-by; about; adjacent; contiguous; abutting. The word as applied to space is a relative term without positive or precise meaning, depending for its signification on the subject-matter in relation to which it is used and the circumstances under which it becomes necessary to apply it to surrounding objects. * * * Not far distant in time, place or degree; not remote; adjoining."

Therefore, I would conclude that Drummond's coal processing plant in this case is not included in the definition of surface coal mining operations.

NEWTON FRISHBERG,
Administrative Judge.

ADMINISTRATIVE APPEAL OF FORT BERTHOLD LAND & LIVESTOCK ASS'N.
v.
AREA DIRECTOR, ABERDEEN AREA OFFICE, BUREAU OF INDIAN AFFAIRS

8 IBIA 90

Decided *June 6, 1980*

Appeal from decision of Area Director raising grazing fees.

Sustained in part; referred for hearing.

1. Indian Lands: Grazing: Generally—Indian Lands: Grazing: Rental Rates

The Bureau's decision to increase grazing fees for the fourth year of the permit period is not inconsistent with the general regulatory provisions of 25 CFR Part 151, which are incorporated by reference in the permit.

2. Indian Lands: Grazing: Generally—Indian Lands: Grazing: Rental Rates

The plain wording of the grazing permit does not convey the stipulation that new fees may be pronounced by Aug. 1, 1979, but not thereafter. As there is no legal requirement that permittees be given prior notice of grazing fee increases, it is not unreasonable to conclude that the Aug. 1 date cited in the permit refers merely to a goal or objective for the completion of fee reevaluations.

3. Indian Lands: Grazing: Generally—Indian Lands: Grazing: Appeals—Indian Lands: Grazing: Rental Rates

The appellant association and members thereof have not been denied *substantive* due process through the readjustment of a grazing permit which specifically provides for readjustment. Appellant's *procedural* due process rights are secured through the opportunity to appeal the Area Director's action to the Commissioner and the Board of Indian Appeals pursuant to the provisions of 25 CFR Part 2 and 43 CFR 4.350–4.369.

APPEARANCES: Jon R. Keriam, Esq., Minot, North Dakota, for appellant; Wallace G. Dunker, Esq., Office of the Field Solicitor, Aberdeen, South Dakota, for respondent; Austin H. Gillette for the Three Affiliated Tribes, Fort Berthold Reservation.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

Appellant in this case is the Fort Berthold Land and Livestock Association, a nonprofit corporation chartered by the Secretary of the Interior as an Indian Association. The Association, composed primarily of Indian ranchers, has appealed from an action of the Aberdeen Area Director, Bureau of Indian Affairs, dated Oct. 4, 1979, raising the minimum acceptable grazing rental rate on the Fort Berthold Indian Reservation.

Appeal of the Area Director's action was before the Commissioner of Indian Affairs until Feb. 1, 1980. On that date, the Commissioner referred the matter to the Board of Indian Appeals for review and final decision pursuant to the provisions of 25 CFR 2.19(b).[1] By order dated Feb. 13, 1980, the Board referred the appeal to the Hearings Division of the Office of Hearings and Appeals for a fact-finding hearing and recommended decision by an Administrative Law Judge in accordance with the provisions of 43 CFR 4.361–4.367.

On Apr. 11, 1980, Administrative Law Judge Keith L. Burrowes filed a recommended decision with the Board. Based on his review of the administrative record, Judge Burrowes concluded that the respondent Bureau could not as a matter of law increase rental rates for the final year of the grazing permit period. Accordingly, no evidentiary hearing was conducted. Pursuant to 43 CFR 4.368, interested parties were afforded an opportunity by the Board to submit exceptions to the recommended decision. Formal exceptions were filed by the Aberdeen Field Solicitor on behalf of the Area Director on Apr. 28, 1980. A letter addressed to the Chief Administrative Law Judge of the Hearings Division from the Tribal Chairman of the

[1] Paragraph (b) of sec. 2.19 must be read in conjunction with paragraph (a). Together, they provide as follows:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commission of Indian Affairs shall:

"(1) Render a written decision on the appeal or

"(2) Refer the appeal to the Board of Indian Appeals for decision.

"(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

Three Affiliated Tribes, dated Apr. 14, 1980, has also been received by the Board as an exception to the recommended decision.

The Board has completed a review of the administrative record, the recommended decision and exceptions thereto, and the memorandum and order entered by the United States District Court for the District of North Dakota on Mar. 31, 1980, in *Danks* v. *Fields* (Civ. No. A4–80–39), an action for declaratory and injunctive relief brought by individual grazing permittees and the Fort Berthold Land and Livestock Association involving, among other things, the subject matter of this appeal. Contrary to the recommended ruling of Judge Burrowes, it is the consensus of the Board that the Area Director was authorized to increase the grazing fees for the permit year commencing Nov. 1, 1979. Based on the record as constituted, the Board remains unable to pass judgment on the reasonableness of the new rate and this issue shall again be referred to the Hearings Division with a request for an expedited fact-finding hearing and recommended decision thereon.

Authority to Adjust Rental Rate

The general authority of the Secretary of the Interior to protect and manage individually owned and tribal trust lands through the regulation of grazing on such lands is summarized at 25 CFR 151.2. Among other Acts, the general grazing regulations set forth in 25 CFR Part 151 were promulgated in response to Federal statutes codified at 25 U.S.C. §§ 393, 397, 403 and 466 (1976). Appellant does not challenge the validity of any of the foregoing laws in this appeal; instead, it is alleged on numerous grounds that the action of the Area Director in raising the rental rate at issue exceeded the limits of his authority as prescribed by contract and regulation.

The factual background necessary to an understanding of appellant's case is summarized in the court's order in *Danks* v. *Fields*, *supra*, as follows:

> In 1976 the Bureau of Indian Affairs (BIA), was preparing to grant permits to graze on Fort Berthold range units. The tribe, on June 10 and 11, 1976, and acting within the framework of the general grazing regulations, passed Range Resolution 76–173 (Exhibit 7), in conformance with 25 CFR 151.2, 3 and 4, The Area Director at Aberdeen, South Dakota, reviewed the resolution, expanded it to include necessary and advisable elements, and returned it as a proposed final resolution to the tribe.
>
> As explained in the redrawn resolution and the covering letter, the Area Director was concerned that the grazing fees of $27.00 for tribal land, and $36.00 for individual land, were too low. But, under 25 CFR 151.13, he accepted the tribal fee as to its lands, and under 25 CFR 151.13 (6) [2] he set the minimum fee for lands under his jurisdiction at $42.00 per animal unit per year.
>
> The original tribal resolution had provided:
>
> "That grazing permits shall be issued for four (4) years contract period beginning November 1, 1976, and terminate

[2] So in original. Should probably read "25 CFR 151.13(b)."

October 31, 1980, with a re-evaluation period after three (3) years."

The Area Director changed that provision to read:

"That grazing permits shall be issued for a four (4) year contract period beginning November 1, 1976, and terminating October 31, 1980. Grazing fees shall be re-evaluated in accordance with 25 CFR by Augst [*sic*] 1, prior to the beginning of the fourth year and such rate shall prevail for the balance of the permit period."

He explained that the proposed four year permits should be re-evaluated after three years only as to the fee.

* * * * *

In 1979, the BIA had an independent evaluater [*sic*] review the grazing land and the market. Based on the evaluation on October 3, 1979, and pursuant to the grazing permit requirements, both the BIA and the Three Affiliated Tribes, estabished [*sic*] for the fourth year of the permit an "animal unit year" fee at $57.00. In a letter dated October 3, 1979, the permittees were informed that they would be billed on the new fee basis and were expected to pay the fee by November 1, 1979, the beginning of the last year of the permit.

Slip Op. at 5–7.

Certain of appellant's grounds for reversal set forth in its notice of appeal have been dismissed by the court in the above-cited opinion. For example, appellant alleges that the Area Director had no authority to alter the permit terms agreed upon by the Three Affiliated Tribes in Resolution No. 76–173 and secondly, that the Area Director could not in any event adjust grazing fees on permits under less than 5 years' duration. In addressing the Area Directors' modification of the permit terms contained in Resolution No. 76–173, the court states in *Danks* v. *Fields*: "Plantiffs maintain that the change above quoted was done in violation of 25 CFR 151.13(a) and 151.14. I disagree. I find the changes were consistent with the regulations, and were in fact beneficial to the permittees, limiting as it did, the scope of permissible re-evaluation." Slip Op. at 6.

Noting that grazing permits as defined by 25 CFR 151.1(k), are a revocable privilege, the court declined to adopt appellant's plaintiffs' position that range permits are complete contracts, fixing, for the duration of the permits, all of the relationships of the parties. *Ibid.*

Based on the foregoing, it appears that appellant is left with a single unresolved challenge to the authority of the Bureau to increase grazing fees on the Fort Berthold Reservation for the 1979–1980 season, viz., that under the purported terms of the approved permit no increase could be decreed after Aug. 1, 1979. This is the position which Judge Burrowes adopts in his recommended decision to the Board.

The provision in controversy is stated in the permits issued in 1976 as follows: "Grazing fees shall be re-evaluated in accordance with 25 CFR by August 1, prior to the beginning of the fourth year and such rate shall prevail for the balance of the permit period."

[1] Appellant is correct in stating that the only specific regulation found in 25 CFR concerning the adjustment of grazing fees is sec.

151.14(c), which pertains to permits for a period in excess of 5 years.[3] (As previously noted, however, the court in *Danks* v. *Fields* was not persuaded that a regulatory scheme which requires 5-year permits to provide for fee adjustments at the expiration of the permit period, could not be interpreted to preclude fee adjustments for permits of lesser duration).

In the absence in the regulations of specific reevaluation or adjustment provisions for 4-year permits, it is reasonable to conclude that the phrase "shall be re-evaluated in accordance with 25 CFR" as found in the subject permits, refers to the general statements of the Secretary's authority and goals as contained in 25 CFR 151.2 and 151.3. As pertinent to the matter of fee adjustment, the foregoing general regulations require the Secretary "to improve the economic well being of the Indian people" and to administer grazing privileges "in a manner which will yield the highest return consistent with sustained yield land management principles and the fulfillment of the rights and objectives of tribal governing bodies and individual land owners." Without addressing the reasonableness of the specific rate increase effected by the Bureau in this case, we hold that the Bureau's decision to increase grazing fees for the fourth year of the permit period is not inconsistent with the general regulatory provisions of 25 CFR Part 151, which are incorporated by reference in the 1976 permits.

[2] With respect to the permit provision that fees shall be re-evaluated *by August 1*,[4] we do not agree that this language precludes the Bureau from setting new fees after August 1. In the first place, in our opinion the plain wording of the permit does not convey the stipulation that new fees may be pronounced by Aug. 1, 1979, but not thereafter. Further, since there is no legal requirement that permittees be given prior notice of grazing fee increases,[5] it is not unreasonable to conclude that the August 1 date cited in the permit refers merely to a goal or objective for the completion of fee reevaluations.

While we have found no related Indian grazing cases, the Board of Land Appeals has held that it was not improper for the Bureau of Land Management to readjust a coal lease issued pursuant to the Mineral Leasing Act, Feb. 25, 1920, 41 Stat. 439, *as amended*, 30 U.S.C. § 207 (1976), "within a reasonable time" after expiration of the initial lease period, with or without notice by the Bureau to the lessee

[3] This regulation provides:
"(c) Permits for a period in excess of 5 years shall provide for review of the grazing fees by the Superintendent at the end of the first 5 years and for adjustment as necessary."

[4] It is acknowledged by all parties that the complete date referred to is Aug. 1, 1979.

[5] Appellant asserts that prior notice is a contractual right of the members of the Association. First Notice of Appeal dated Nov. 5, 1979, at 4. We disagree. The permits granting grazing privileges to members of the Association contain no mention of notice. Neither do the applicable statutes, regulations or BIA manual provisions (55 BIAM Supp. I).

324-693 O - 80 - 2 : QL 3

prior to the anniversary date of the lease, and notwithstanding the fact that the statute specifically authorizes the readjustment of lease terms "at the end of" each lease period. *California Portland Cement Co.*, 40 IBLA 339 (1979), *appeal pending sub nom., Rosebud* v. *Andrus*, Civ. No. 79–160 (D. Wyo., filed June 6, 1979). Among other things, the Board of Land Appeals noted that appellants' argument that readjustment could not be made after the technical expiration of the lease period "ignores the difficulties attendant upon readjustment and the realities of the coal industry during the period prior to the lease anniversary dates in 1975." 40 IBLA 345. The Board went on to hold that appellants' rights to substantive due process were not violated by the readjustment of a lease which specifically provides for readjustment. 40 IBLA 347. With respect to procedural due process, the Board noted that existing procedures allow objections to be filed to readjustment determinations, including a right of appeal to the Board. *Ibid.*

Similarly, in the case at hand we find that the appellant Association and the members thereof have not been denied *substantive* due process through the readjustment of a grazing permit which specifically provides for readjustment. Moreover, unlike *California Portland Cement Co.*, *supra*, the readjustment before us was pronounced *prior* to the expiration of the lease period. In addition, appellant's *procedural* due process rights are secured through the opportunity to appeal the Area Director's decision to the Commissioner and this Board pursuant to the provisions of 25 CFR Part 2 and 43 CFR 4.350–4.369.[6]

Reasonableness of Rental Rate Increase

Appellant alternatively alleges in this case that "the data upon which the Agency based its re-evaluation of the grazing fees constitutes an invalid and inadequate data base." Second Notice of Appeal, dated Nov. 5, 1979, at 4. In support of this allegation, appellant refers to numerous alleged shortcomings and inaccuracies in the independent appraisal furnished the Bureau in September 1979. Based on the record as constituted, it is not possible for the Board to evaluate the merits of appellant's contention. While we do not believe that permittees are entitled to a formal evidentiary hearing whenever a rental adjustment is proposed by the Bureau, under the circumstances of this case an evidentiary hearing seems necessary and appropriate.

This matter shall therefore be referred to the Hearings Division for

[6] The Field Solicitor's contention that the subject matter of this case is not appealable under 25 CFR Part 2 is without merit. The provisions of 25 CFR Part 2 apply to requested correction of actions by BIA officials where the matter is protested as a violation of a right or privilege of the appellant. 25 CFR 2.2. *See also*, 43 CFR 4.351. Allegations that an increase in grazing fees were unauthorized and in the alternative, not based on valid data or considerations, present issues cognizable under the appeal provisions of 25 CFR Part 2.

reassignment to an Administrative Law Judge to conduct a hearing and render a recommended decision to the Board on the reasonableness of the grazing fee increase at issue. Expedited consideration will be requested in light of the important interests at stake and in view of the court's conclusion in *Danks* v. *Fields* that Indian ranchers and Indian landowners are being harmed by the continuing failure of the Department to resolve this controversy.

ORDER

Appellant's request that the Aberdeen Area Director's decision of Oct. 4, 1979, raising the grazing fees on the Fort Berthold Indian Reservation, be reversed as a matter of law is denied. This case is referred to the Hearings Division pursuant to 43 CFR 4.361(a) for an evidentiary hearing and recommended decision by an Administrative Law Judge on the sole issue of the reasonableness of the fees set by the Area Director. By this order, it is requested that the Hearings Division provide expedited consideration of this case.

WM. PHILIP HORTON
Chief Administrative Judge

WE CONCUR:

FRANKLIN ARNESS
Administrative Judge

MITCHELL J. SABAGH
Administrative Judge

BLACK FOX MINING & DEVELOPMENT CORP.

2 IBSMA 110

Decided *June 6, 1980*

Appeal by Black Fox Mining & Development Corp. from that part of a Jan. 28, 1980, decision by Administrative Law Judge Sheldon L. Shepherd upholding a violation of 30 CFR 715.17(a) described in Notice of Violation No. 79–I–54–14 (Docket No. CH 9–172–R).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Hydrologic System Protection: Generally—Surface Mining Control and Reclamation Act of 1977: Water Quality Standards and Effluent Limitations: Sedimentation Ponds

The sedimentation pond requirement of 30 CFR 715.17(a) is a preventive measure and proof of the occurrence of the harm it is intended to prevent is not necessary to establish a violation of that requirement.

2. Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: Generally

Evidence concerning an alternative method of silt control does not show compliance with the sedimentation pond requirement of 30 CFR 715.17(a); such evidence may be presented to the regulatory authority which may grant exemptions to that requirement.

APPEARANCES: Leo M. Stepanian, Esq., Brydon, Stepanian & Muscatello, Butler, Pennsylvania, for Black Fox

Mining & Development Corp.; Billy Jack Gregg, Esq., Office of the Field Solicitor, Charleston, West Virginia, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Division of Surface Mining, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Black Fox Mining & Development Corp. (Black Fox) has appealed from that part of a Jan. 28, 1980, decision by Administrative Law Judge Sheldon L. Shepherd upholding Violation No. 1 of Notice of Violation No. 79–I–54–14. Violation No. 1 concerned an alleged failure to pass all surface drainage from disturbed areas through a sedimentation pond or series of ponds before allowing it to leave the permit area in violation of 30 CFR 715.17(a). For the reasons stated below, the decision appealed from is affirmed.

Procedural Background

On July 24, 1979, pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act)[1] inspectors from the Office of Surface Mining Reclamation and Enforcement (OSM) visited a surface coal mining operation in Butler County, Pennsylvania. The inspectors issued Notice of Violation No. 79–I–54–14 containing two alleged violations to Black Fox, the permittee. On Aug. 2, 1979, Black Fox sought review of the violations. A hearing was held and in the Jan. 28, 1980, decision is was concluded that Violation Nos. 1 and 2 of the notice were properly issued.[2] Black Fox filed a timely notice of appeal and both parties filed briefs.

Discussion

The evidence produced at the hearing established a prima facie case that appellant violated 30 CFR 715.17(a).[3] Sedimentation ponds and diversion ditches had been constructed on the southeastern portion of the permit area (Tr. 9; Exh. R–8). On the date of the inspection one of the ditches leading to a pond had been breached, and there was evidence that surface drainage had run in the ditch toward the breach (Tr. 6). Another ditch did not lead to a pond, but emptied into a grassy area off the disturbed area (Tr. 6–7). The ditch received surface drainage from approximately 3 acres of disturbed area. There was evidence that sediment had washed into that ditch—"a fan-type delta of clay material—what appeared to be clay material" (Tr. 13–14). Ap-

[1] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. I 1977).

[2] While the decision below concluded that Violation Nos. 1 and 2 were properly issued, there was apparently no reason to rule on Violation No. 2. That violation was admitted by Black Fox, and the application for review, as it related to that violation, was withdrawn with prejudice at the hearing (Tr. 3; Decision at 1).

[3] 43 CFR 4.1171 states:

"(a) In review of section 521 notices of violation * * *, OSM shall have the burden of going forward to establish a prima facie case as to the validity of the notice, * * *.

"(b) The ultimate burden of persuasion shall rest with the applicant for review."

proximately 300 feet to the east of the diversion ditches in question there was a stream (Exh. R–8).

Appellant admitted that the diversion ditches were located to intercept surface drainage as it moved downhill toward the stream (Tr. 33); that surface drainage in those ditches would exit at the breach before reaching a sedimentation pond or would drain into the grassy area without passing through a pond (Tr. 33–34); and that such drainage would not pass through any sedimentation ponds before leaving the permit area or before entering the stream (Tr. 34).

Appellant failed to rebut OSM's prima facie case. Appellant's principal argument was that OSM did not show that surface drainage left the permit area. To the contrary, the evidence clearly established that surface drainage traveled in the diversion ditches; that such drainage would not pass through sedimentation ponds before reaching the stream; and that because of the downhill location of the stream, surface drainage would necessarily flow toward the stream which was off the permit area.

[1] Appellant's evidence apparently was directed at proving that no sedimentation from the permit area reached the stream. While appellant faults OSM for failing to provide evidence of sediment reaching the stream, it is mistaken concerning the type of evidence necessary to establish the violation cited by OSM. In *Island Creek Coal Co.*, 1 IBSMA 285, 290, 86 I.D. 623, 626 (1979), we held with respect to the haul road maintenance requirements of 30 CFR 717.17(j) that OSM did not need to provide evidence of suspended solids entering a stream in order to establish a violation of those maintenance requirements designed to prevent disturbance of the hydrologic balance. Similarly, the sedimentation pond requirement of 30 CFR 715.17(a) is a preventive measure and proof of the occurrence of the harm it is intended to prevent is not necessary to establish a violation of that requirement. Even assuming appellant could prove that no silt reached the stream, that would not necessarily show that no surface drainage left the permit area nor would it be sufficient to rebut OSM's prima facie case.

[2] Furthermore, appellant's evidence concerning natural vegetation as an alternative method for silt control did not show compliance with 30 CFR 715.17(a). While that regulation provides that the regulatory authority may grant exemptions from the sedimentation pond requirement, there is no evidence in the record that appellant ever sought an exemption. *See White Winter Coals, Inc.*, 1 IBSMA 305, 314–315, 86 I.D. 675, 679 (1979); *aff'd mem.*, *White Winter Coals, Inc.* v. *Andrus*, No. 3–80–3 (E.D. Tenn. Apr. 13, 1980).

Appellant also argues that is cannot be charged with a violation of 30 CFR 715.17(a) because OSM failed to designate an inconsistent

Pennsylvania law as required by sec. 505 of the Act.[4] The Pennsylvania law referred to by appellant[5] provides that mining permits will not be approved without a practicable method for preventing siltation or other stream pollution. Appellant asserts that since a mining permit was issued, it was in compliance with Pennsylvania law concerning surface water drainage.

Permit approval does not guarantee day to day compliance with the law. The cited regulation, 30 CFR 715.17(a), requires that surface drainage be passed through sedimentation ponds. Appellant's permit requirements were apparently in accord with this requirement in that appellant had installed sedimentation ponds on the permit area. In fact drainage in one of the diversion ditches in question would have passed through a pond but for the breach that occurred. The record fails to disclose that the sedimentation pond requirement of 30 CFR 715.17(a) was in any way inconsistent with the sedimentation control measures approved by the State for this permit.

That part of the decision appealed from is affirmed.

MELVIN J. MIRKIN
Administrative Judge

NEWTON FRISHBERG
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

[4] Sec. 505 (30 U.S.C. § 1255 (Supp. I 1977)) reads in relevant part:

"(a) No State law or regulation in effect on the date of enactment of this Act, or which may become effective thereafter, shall be superseded by any provision of this Act or any regulation issued pursuant thereto, except insofar as such State law or regulation is inconsistent with the provisions of this Act.

"(b) * * * The Secretary shall set forth any State law or regulation which is construed to be inconsistent with this Act."

[5] Appellant cites the law on page 6 of its brief as follows:

"The Pennsylvania Surface Mining Conservation and Reclamation Act, Act of Nov. 30, 1971, P.L. 554, 52 P.S. 1396.4(a)(2)(K) states:

". . . No approval (of the mining permit) shall be granted unless the plan provides for a practicable method of avoiding acid mine drainage and preventing avoidable siltation or other stream pollution. Failure to prevent water from draining into or accumulating in the pit, or to prevent stream pollution during surface mining or thereafter, shall render the operator liable to the sanctions and penalties provided in this act and is [*sic*] 'The Clean Streams Law,' and shall be cause for revocation of any approval, license or permit issued by the department to the operator."

APPEAL OF TIFFANY CONSTRUCTION CO.

IBCA–1162–8–77

Decided *June 12, 1980*

Contract No. N00–C–1420–6280, Bureau of Indian Affairs.

Sustained in part.

1. Contracts: Disputes and Remedies: Equitable Adjustments

Where the evidence of record is too general and inconclusive to permit a precise mathematical computation of quantum, but preponderates in favor of the contractor for entitlement to some allowance for unpaid excavation resulting from performance of a fixed price highway construction contract, the Board will determine the equitable adjustment by utilization of the jury verdict approach.

2. Contracts: Disputes and Remedies: Equitable Adjustments

In the absence of a statute, procurement regulation, or specific contract

provision permitting recovery from the Government for the costs of professional services not contributing directly to the performance of a fixed price type contract, such costs will not be allowed as part of an equitable adjustment, whether incurred before or after the findings of fact and decision of the contracting officer.

APPEARANCES: Mr. James P. Cunningham, Attorney at Law, Cunningham, Goodson & Tiffany, Ltd., Phoenix, Arizona, for Appellant; Mr. William D. Back, Department Counsel, Window Rock, Arizona, for the Government.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF CONTRACT APPEALS

Background

Tiffany Construction Co. (Tiffany, sometimes, appellant and sometimes, contractor) entered into contract No. NOO–C–1420–6280 with the Bureau of Indian Affairs (BIA), Department of the Interior on Oct. 4, 1974, for the construction of approximately 20 miles of highway grade and drain on the Navaya Indian Reservation, San Juan County, New Mexico. The work was substantially and satisfactorily completed on Nov. 4, 1975, well within the prescribed period of performance, including extensions, and there is no issue involved regarding the standard of performance by the contractor (AX–1).[1]

However, two principal disputes arose between the contracting parties. The first pertains to the correct final quantity measurement in cubic yards of the actual excavations performed by Tiffany. The second is whether Tiffany is entitled to certain extraordinary expenses incurred by it in the course of uncovering errors in the Government's earthwork calculations prior to the findings of fact and decision rendered by the Contracting Officer (CO).

The contract documents provided for three items of excavation: Item No. 203(3), Unclassified Excavation, at the unit price of $1.10 per cubic yard; Item No. 203(6), Borrow Excavation, at the unit price of $1.20 per cubic yard; and Item No. 203(6a), Borrow Excavation, at the unit price of $2.05 per cubic yard.[2] The total original contract price was $1,681,740, but by the time the 18th and final Modification Order No. 18, dated Apr. 21, 1977, had been issued, the total contract price had increased to $2,022,124.85.

[1] References to the record throughout this opinion will be abbreviated typically as follows: Appeal file, Exhibit 24—(AF–24); (Continued)

(Continued)
Appellant's Exhibit 1—(AX–1); Government's Exhibit A—(GX–A); and Transcript, page 39—(Tr. 39). (AX–1) was a letter dated Dec. 19, 1975, signed by the Contracting Officer and addressed to Tiffany acknowledging final completion and acceptance as of Nov. 4, 1975, within the completion date of Nov. 28, 1975, and that no liquidated damages were involved.

[2] Normally, for construction of the kind involved here, material is taken from excavated areas for building the roadbed embankments and additional material, if necessary, from areas designated as borrow pits. The planned quantities, set forth in the contract, for the disputed items were as follows: Item 203(3), 696,040 cubic yards; Item 203(6), 87,730 cubic yards; and Item 203(6a), 102,178 cubic yards (AF–4).

Within the first 2 months of the contract work, Tiffany requested that it be allowed to obtain additional material by widening the ditches in certain areas rather than by excavating from the borrow pits. The request was made ostensibly for the benefit of both parties: The Government would save $0.10 per cubic yard and Tiffany would have a shorter haul (Tr. 151). By letter dated Dec. 10, 1974, Mr. Darrell Statham, Project Officer for the Government and also the Contracting Officer's representative (COR), after consultation with other engineers, agreed to the request for ditch widening "at suitable locations," but specified that the price would be at the Unclassified Excavation rate of $1.10 per cubic yard rather than the Borrow Excavation rate of $1.20 per cubic yard (AX-2).

Both Mr. Statham and Mr. Herb Tiffany, President of the appellant company, believed at that time that if the ditches were widened in certain areas, the excavation in those areas would probably exceed the planned quantity of excavation (Tr. 35, 156). Mr. Statham also testified that he recollected little, if any, unauthorized wasting; that there were about three areas where wasting was permitted by the Government inspectors; and that he had no recollection of excessive wasting by the contractor (Tr. 43, 44).

During construction the amount of daily excavation was measured by truckload count, but this method of measurement was used only as a "rule of thumb" measurement to aid in expediting progress payments to the contractor. Final payment was to be based on final surveys determining the actual as-built quantity of excavation (Tr. 45, 46).

A month or two before the substantial completion of the work, BIA's survey crews had started the necessary work to make the quantity determinations regarding the volume of excavations performed by the contractor. Mr. Tiffany was led to believe by BIA contract administrative officials that the settlement figures would be available by Nov. 15, 1975. However, after several postponements he was informed by the COR in January 1976 that there had been computer errors in the determinations and that the Government was having difficulties in coming up with final figures (Tr. 57–58, 157–161). Having received no indication from the Government by February 1976, Tiffany filed a court action seeking a writ of mandamus to compel the Government to determine final earthwork quantities and make payment accordingly. The suit was withdrawn after a meeting was held, certain matters resolved, and the contractor furnished cross-section earthwork computations, drawings, and data then available.[2]

When it became apparent to Tiffany that there was major disagreement with the Government's figures on quantity determinations of

[2] Undated memo from the Contracting Officer to the Field Solicitor transmitting appeal file.

excavation, a registered civil engineer, Mr. Jeff D. Hardin, was hired to help resolve the disagreement. He accompanied Mr. Tiffany at a meeting held with BIA officials at Gallup, New Mexico, on Mar. 25, 1976, at which time the BIA issued modification No. 16 which stated the final quantities of excavation to be as follows: Item 203(3), 676,604 cubic yards; Item 203(6), 95,764.15 cubic yards; and Item 203(6a), 85,394.33 cubic yards. When these figures were compared to the planned quantities (n.2) a minus quantity for total excavation resulted. This meant that the Government, having paid on a planned quantity basis, would be seeking refunds from appellant because of overpayment.

Tiffany insisted that the Government's figures were incorrect, since throughout the contract period estimated quantities (load count) for Unclassified Excavation (Item 203 (3)) were running well over the planned quantities. For example, according to the Government's Daily Construction Report (AX–6), that item, on July 25, 1975, was 843,202 cubic yards. Thereupon, Tiffany employed legal counsel and professional surveyors under the supervision of Mr. Hardin, to conduct the necessary surveys and make calculations to arrive at an independent determination of the disputed quantities.

As a result, another meeting was held with BIA officials on Apr. 28, 1976, to discuss the substantial quantity differences between the parties regarding earthwork and excavations. Tiffany personnel pointed out that by a random survey of 95 out of an approximate total of 1,000 stations, or about 10 percent of the total project, about 23,900 cubic yards had not been computed by the Government. They took the further position that their preliminary estimates would probably be borne out if a complete survey was conducted and that they wanted payment. Significantly, at this meeting the COR, Mr. Statham, revealed that the computer had not been programmed for the Mar. 11, 1976, computer run on an "as-built" measurement, but rather on the basis of design slopes. It was further indicated by Government personnel that a new computer run, based on actual quantities would be necessary (AF–11).

After the meeting of Apr. 28, 1976, considerable correspondence and negotiations ensued between the parties for several months, with little progress toward a final settlement. Some agreement was reached, however, as reflected in Modification No. 17, dated Oct. 20, 1976 (AF–3), but this modification was accepted by the contractor with the understanding that its right to assert claims for certain items still remaining in dispute was reserved (AF–15). By letter of Dec. 13, 1976, Tiffany requested the Contracting Officer to deny its claims for unclassified excavation, borrow, an extraordinary expense so that its appeal could be perfected (AF–16). In response, on Jan. 21, 1977,

the Contracting Officer, by letter, informed Tiffany of the Government's calculations of earthwork quantities. They were listed as follows: Item No. 203(3), Unclassified Excavation—planned quantity 696,040 cubic yards, as-built quantity 731,997 cubic yards; Item No. 203(6), Borrow Excavation—planned quantity 87,730 cubic yards, as-built quantity 95,540 cubic yards; Item 203(6a), Borrow Excavation—planned quantity 102,178 cubic yards, as-built quantity 85,394.33 cubic yards. The letter summarized the dollar calculations showing a net increase of $14,518.18 which was offered to Tiffany, but denied Tiffany's claim for extraordinary expenses incurred for establishing its claims (AF–36).

Although the latter document was not entitled "Findings of Fact and Decision of the Contracting Officer," it was treated as such by the parties. On Feb. 2, 1977, Tiffany filed its notice of appeal with the Contracting Officer for forwarding to this Board, but apparently, because of the extensive further correspondence between the parties after that time in an effort to settle their remaining differences, the notice of appeal was not forwarded to the Board until Aug. 17, 1977 (AF–40). In its notice of appeal (AF–8), appellant made the following claims:

1. For Unclassified Excavation, Item 203(3)—as-built in excess of 776,346 cubic yards, instead of 731,997 cubic yards as determined by the Government, at $1.10 per cubic yard, or $88,338.60.

2. For Borrow Excavation, Item 203(6)—as-built 97,830 cubic yards instead of 95,540 cubic yards at $1.20 per cubic yard or $14,112, alleging that it was paid for only 85,970 cubic yards.

3. For Borrow Excavation, Item 203(6a)—as-built 87,648 cubic yards as opposed to the Government's figure of 97,069 cubic yards for which, at $2.05 per cubic yard it was overpaid $19,313.05 and that both the Government's planned quantity and as-built quantity figures for this item were incorrect. (The total net claim for excavation after allowing for appropriate debits and credits was $83,137.55.)

4. For Extraordinary Expenses incurred, in order that portions of the contract could be clarified, change orders recognized and all claims except excavation and extraordinary expenses resolved, itemized as follows:

Attorneys fees	$4,500.00
Consulting Engineer fees	8,318.00
Professional Surveyors fees	5,439.60
Travel Expenses	502.00
Total	18,759.60

5. For Interest on $83,135.55 at the legal rate from Jan. 1, 1976, representing approximately 60 days following acceptance of the contract.

The notice of appeal was allowed by the Board to be treated as appellant's complaint. By way of answer, the Government denied that its final figures were erroneous, averred that (i) appellant was

finally paid for all items to which it was entitled by virtue of Modification No. 18, dated Apr. 21, 1977, and (ii) that the claimed extraordinary expenses were unallowable under applicable statutes and regulations, and requested that Tiffany take nothing by its appeal.

Discussion

At the outset of the evidentiary hearing the parties stipulated that the final quantities determined by the BIA are reflected in Modification No. 18 (AF–4), and that the net increase shown of $14,518 was paid by BIA to the contractor. Modification No. 18 shows the net increase of $14,518 to be based on as-built quantities of 731,997 cubic yards at $1.10 or a plus $39,552 for Item 203(3); 95,540 cubic yards at $1.20 or a plus $9,372 for Item 203(6); and 85,394.33 cubic yards at $2.05 or a minus $34,406 for Item 203(6a). Appellant's counsel then purported to amend the complaint in the following respects: On claim one from $88,338.60 to $48,783 and on Claim two from $14,112 to $2,748 (Tr. 5 and 6). Other amendments were held in abeyance until the conclusion of the hearing (Tr. 6), but were, in fact, not mentioned again at the conclusion of the hearing, or at any other time. We observe that appellant's claims varied substantially from time to time throughout this proceeding. In the notice of appeal (complaint) Tiffany claimed $83,137 for unpaid excavation and $18,759 for extraordinary expenses for a total claim of $101,897. As amended, its complaint resulted in a reduction of $50,978 to a net total of $50,919 claimed. However, in its posthearing brief, Tiffany's claim totaled $71,725.10 with a change in the claim for extraordinary expenses from $18,759 to $17,857.

In addition to our foregoing references to the evidence, we find the following items to be particularly significant:

1. Even though the COR, Mr. Statham, who probably observed firsthand the project construction more frequently and in greater detail than any other BIA employee, testified that he had no recollection of excessive unauthorized wasting by the contractor (Tr. 43, 44), the Government, nevertheless, charged Tiffany with 7,290 cubic yards at $1.10 for excess excavation and waste (AF–27).

2. The Government never presented in this record any explanation, satisfactory to the Board, for the dramatic differences of computation for unclassified excavation, Item 203(3), as between the final computer determination and the final load count determination. The final load count, upon which interim payments to the contractor were to be based, was shown in the Government's Daily Construction Report of July 25, 1975 (AX–6), to be 843,202 cubic yards, while the final computer determination according to modification No. 18 dated Apr. 21, 1977 (AF–4), was 731,997 cubic yards, a difference of 111,205 cubic

yards. The Government witnesses admitted that between December 1975 and June 1977 to arrive at the final quantity determinations for excavation, data was run through the computer 30 times or more and 5 final computer runs were necessary in order to accomplish the purging of errors and that the first 2 final computer runs had been based on "planned" rather than "as-built" quantities (Tr. 59, 66–67, 234, 253). The record fails to disclose any reasonable explanation or justification for the occurrence of so many errors requiring so many computer runs.

4. Although the work performed by Mr. Hardin, the independent engineer hired by Tiffany, and his crew of professional surveyors clearly resulted in uncovering errors in the Government's calculations, they did not purport to undertake a complete survey of the entire project to come up with accurate or conclusive total calculations of quantities of excavation (Tr. 95–96). Furthermore, the record shows that in the course of making calculations Mr. Hardin used the "planimeter" method of calculation which he admitted was not as accurate as the arithmetic used by the BIA, but stated that it was fast and accurate enough to be within 5 or 10 percent (Tr. 122–123).

5. Mr. Lewis C. Johnson, a former resident engineer for the State of Arizona and an independent consulting engineer at the time of the hearing, testified that he had reviewed the document entitled "Analysis of Earthwork Quantities," prepared by the Government in June of 1976; that he agreed with Mr. Jeff Hardin's figures in reference to excess excavation over the design excavation; that upon his review of pertinent documents including the daily job reports prepared by the Government for this project he could find no evidence of wasting except for one minor instance which Tiffany's project superintendent agreed to correct; and that based upon his experience it was normal custom in the industry for the Government to have a letter of final quantities to the contractor within 30 days after acceptance of the work and final payment to the contractor within 45 days.

Claim for Unpaid, Performed Excavation

[1] Based upon our review and study of the entire record in this proceeding, we are convinced that no one will ever know, with reasonable certainty, the precise number of cubic yards of as-built excavation performed by the contractor for which it was entitled to be paid. The evidence adduced provides the Board with no real assurance that the fifth final computer run made by the Government was any more accurate than the third or fourth. We do believe, however, that the fifth was probably more correct than the first or second, because at least, in the fifth run the computer apparently was programmed to determine "as-built" quantities rather than "planned" quantities.

On the other hand, we also have difficulty with Tiffany's figures be-

cause of the uncertainty of its position indicated by the wide variance in the amount of its claims from time to time, and secondly because of the inconclusive testimony of its principal witnesses. We have decided, nevertheless, upon weighing all the evidence presented by both parties, that a preponderance favors appellant.

Our specific findings of fact and conclusions regarding this claim are as follows:

1. That the Government was negligent in performing its obligation to present final earthwork quantities to the contractor within a reasonable time and with reasonable accuracy after the project work was approved and accepted by the contracting officer;

2. That no excessive wasting of excavation by the contractor was established by the evidence and, in the circumstances of this case, it was error on the part of the Government to charge Tiffany with 7,290 cubic yards of excessive excavation and waste;

3. That despite the uncertainty of its position and the unsatisfactory and incomplete presentation of quantum evidence, the weight of the evidence, with respect to entitlement in some amount for unpaid excavation, preponderates in favor of the appellant; and

4. That it is impractical in this proceeding for the Board to attempt to arrive at a quantum figure by the application of any mathematical formula, and therefore, a jury verdict approach is appropriate.[4]

Applying the jury verdict approach to the evidence of record, we conclude that Tiffany's claim for additional payment for excavation performed in this project should be allowed in the amount of $25,000.

Claim for Extraordinary Expenses

The Government offered no evidence to refute the expenditure of $17,857 by Tiffany in making its own determinations of quantities prior to presenting claims to the contracting officer. That such sum was expended for attorneys' fees, consulting engineers, professional surveyors, and travel expenses for such purpose prior to the findings of fact and decision by the contracting officer is fully supported by the evidence, and we so find. The Government contends, however, that as a matter of law, this claim is unallowable pursuant to applicable statutes and regulations (Govt. Answer p. 3).

We agree with the Government that an issue of law is presented by this claim and that the claim is unallowable. Allowance of this claim would run counter to the long-standing general rule that legal fees (professional fees) for litigation in the Federal courts, whether for prosecution of a claim or its defense, may not be taxed to either party, and the general rule that

[4] *See* our decision in *G.T.S. Co., Inc.*, IBCA No. 1077-9-75 (Sept. 15, 1978), 85 I.D. 373, 78-2 BCA par. 13,424, where a jury verdict approach was applied.

legal fees for prosecuting or defending claims in contract appeal proceedings may not be awarded.

Appellant has cited several cases to support this claim and makes a special point of noting that the expenses involved were incurred prior to the final decision of the contracting officer regarding quantities. By citing these cases, however, appellant has shown its misunderstanding of the general rule and the distinction between cost reimbursable type and fixed price type contracts. This case is concerned only with a fixed price type contract. We do not consider the cases cited by appellant to be controlling. They were either out of date, not in point, or distinguishable from the facts here because of specific contract provisions, such as termination settlement clauses, or procurement regulations allowing recovery for professional services as indirect costs.

[2] As we understand the authorities, in the absence of a statute, procurement regulation, or specific contract provision permitting recovery from the Government for the cost of professional services not contributing directly to the performance of a fixed unit price contract, the contractor is precluded from recovering such cost in a proceeding for an equitable adjustment, whether incurred before or after the final decision of the contracting officer.[5] Therefore, since this proceeding does not involve such a statute, regulation, or contract provision, appellant's claim for extraordinary expenses must be denied.

Interest

Appellant improperly claims interest from Jan. 1, 1976, approximately 60 days following acceptance of the contract. Appellant will be allowed interest on the amount of its recovery, not from the date claimed, but in accordance with the provision of paragraph 37, "Payment of Interest on Contractors' Claims," found in "Additions to General Provisions," of the contract. That paragraph provides that interest shall be paid at the rate determined by the Secretary of the Treasury pursuant to the Act of July 1, 1971, P.L. 92–41, 85 Stat. 97, from the date the contractor furnishes to the contracting officer his written appeal under the disputes clause of the contract. According to the record in this case, that date was Feb. 2, 1977.[6]

Decision

Accordingly, Tiffany's claim for unpaid excavation is sustained in the amount of $25,000 with interest allowed thereon as provided by law from Feb. 2, 1977. Its claim for extraordinary expenses is denied.

DAVID DOANE
Administrative Judge

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

[5] *See Lear Siegler, Inc.*, ASBCA No. 20040 (Jan. 31, 1979), 79–1 BCA par. 13,687, and the cases cited and discussed therein.

[6] Appeal file, Exhibit 41, a letter addressed to the Board from the contractor dated Aug. 18, 1977, stating that on Feb. 2, 1977, it transmitted its Notice of Appeal to the contracting officer.

APPEAL OF CHICKALOON MOOSE CREEK NATIVE ASS'N, INC.

4 ANCAB 250

Decided *June 16, 1980*

Appeal of Chickaloon Moose Creek Native Ass'n, Inc., from the Bureau of Land Management Decision AA–8489–A2 and AA–8489–B.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing—Alaska Native Claims Settlement Act: Conveyances: Reconveyances

Where land selections by a Cook Inlet village corporation pursuant to § 12(a) of ANCSA are rejected by the Bureau of Land Management so that such lands may be conveyed to Cook Inlet Regional Corp., which is obligated to reconvey lands to the village under the terms of an amendment to ANSCA, the village corporation's interest in its rejected land selection and in its ultimate right to reconveyance of land constitutes a property interest affected by a determination of the Bureau of Land Management, sufficient to confer standing under regulations contained in 43 CFR 4.902.

2. Alaska Native Claims Settlement Act: Conveyances: Reconveyances

Where the Secretary of the Interior and Cook Inlet Regional Corp. execute an agreement setting forth the procedure by which land shall be conveyed to the regional corporation for reconveyance to villages within Cook Inlet Region, and such procedure is authorized by Congress in an amendment to ANCSA, the agreement is binding on the Bureau of Land Management and the BLM is required to convey lands to Cook Inlet Regional Corp. pursuant to the terms of the agreement.

3. Alaska Native Claims Settlement Act: Conveyances: Reconveyances

When BLM rejects a village corporation's land selections for the purpose of conveying such lands to Cook Inlet Regional Corp., for reconveyance pursuant to § 4(a) of P.L. 94–456 and associated agreements, the rejection extinguishes the right of the village corporation to receive title from the Federal Government to those lands selected, but does not adjudicate or extinguish the right of the village corporation to receive title from Cook Inlet Region, Inc., to those lands.

4. Alaska Native Claims Settlement Act: Conveyances: Reconveyances

The rights of a village corporation in the Cook Inlet Region to receive title from Cook Inlet Region, Inc., to lands for which it had applied pursuant to § 12(a) of ANCSA are determined by the terms of § 4(a) of P.L. 94–456 and associated agreements.

5. Alaska Native Claims Settlement Act: Conveyances: Interim Conveyance—Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

Interim conveyance and patent are documents of equal significance in the granting of title under ANCSA and its amendments, unless such amendments provide otherwise. Sec. 4(a) of P.L. 94–456 does not authorize the Secretary of the Interior to grant less than full legal title to Cook Inlet Region, Inc. Therefore, when BLM issues interim conveyance to Cook Inlet Region, Inc. pursuant to P.L. 94–456, the Secretary of the Interior and this Board lose jurisdiction of those interests in lands which have been conveyed and cannot maintain control over such lands pending reconveyance by Cook Inlet Region, Inc.

6. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

Contractual disputes between the appellant and other corporations are not appeals from findings of Departmental officials within the contemplation of jurisdictional regulations in 43 CFR 4.1(b)(5), nor can they be decided by this Board in connection with such appeals.

APPEARANCES: Elliott T. Dennis, Esq., Edgar Paul Boyko, Esq., Boyko and Davis, on behalf of the Appellant, Chickaloon Moose Creek Native Ass'n. Inc.; Dennis Hopewell, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management; Joyce E. Bamberger, Esq., on behalf of Cook Inlet Region, Inc.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

SUMMARY OF APPEAL

Chickaloon Moose Creek Native Association, Inc. (Chickaloon), a village corporation within Cook Inlet Region, challenges the method by which the Bureau of Land Management (BLM) seeks to implement P.L. 94–456 and associated agreements. Appellant contends that BLM erred in rejecting certain village selections and conveying the same land to Cook Inlet Region, Inc. (CIRI) for reconveyance to the village. Chickaloon contends that the rejection of its selections affects its rights under the Alaska Native Claims Settlement Act and its amendment, P.L. 94–456, because it acts to extinguish the individual selections thereby giving CIRI unlimited discretion as to which lands it must reconvey to the individual village corporation. Chickaloon seeks to have BLM hold its selections in abeyance pending reconveyance of its lands to it by CIRI. The Board finds that under P.L. 94–456 and the agreement of Aug. 31, 1976, between CIRI and the Department, BLM is obligated to convey to CIRI and cannot simultaneously hold Chickaloon's selection in abeyance because upon conveyance to CIRI, BLM loses jurisdiction over the land.

JURISDICTION

The Alaska Native Claims Appeal Board pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

PROCEDURAL BACKGROUND

Chickaloon timely appealed a decision of BLM dated Nov. 30, 1979, covering land selections under the Alaska Native Claims Settlement Act (43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977) (ANCSA)). The decision rejected in part certain village selection applications, and approved lands for conveyance to CIRI pursuant to an agreement dated Aug. 31, 1976, between CIRI and the Secretary of the Interior (hereinafter Region/Government

agreement) which was authorized in an amendment to ANCSA in the Act of Oct. 4, 1976, § 4(a), P.L. 94–456, 90 Stat. 1934, 1935.

The Board on Feb. 8, 1980, issued an order partially dismissing this appeal as to forty-two sections of land. The grounds for dismissal were that Chickaloon had not selected lands within these forty-two sections and therefore could not be found to claim a property interest in such lands within the meaning of standing regulations in 43 CFR 4.902. Cook Inlet Region, Inc., had strongly urged segregation and conveyance of these forty-two sections so that such lands could be conveyed to CIRI, thereby enabling CIRI and two other CIRI villages (Knik and Tyonek) to perform their obligations under an agreement with the Alaska Power Authority (APA), allowing APA to perform a feasibility study for the Susitna Dam Project on lands including the forthy-two sections.

While Chickaloon contended that lands it had selected would be impacted by performance of the agreement with APA, to which Chickaloon was not a party, the Board found that this did not constitute a claim of property interest in lands *not* selected by Chickaloon. Insofar as Chickaloon challenged the validity of the agreement between APA, CIRI, and other CIRI villages, the Board found that contractual disputes between the appellant and other corporations are not appeals from findings of Department officials within the contemplation of jurisdictional regulations in 43 CFR 4.1(b)(5), and could not be decided by this Board in connection with such appeals. The Board then directed Chickaloon to file its Statement of Standing and Statement of Reasons in this appeal, regarding lands not affected by the order of partial dismissal.

Chickaloon, on Feb. 13, 1980, filed its statement of standing and reasons, along with a motion for reconsideration of the partial dismissal. The Board denied the motion because BLM, immediately following the partial dismissal, had conveyed the affected forty-two sections of land to CIRI and when a patent or interim conveyance to land has been issued, this Board and the Department of the Interior lose administrative jurisdiction over that land. (*Appeal of Eklutna, Inc.*, 1 ANCAB 305, 84 I.D. 105 (1977) [VLS 75–1]; *Appeal of James W. Lee*, 3 ANCAB 334 (1979) [VLS 79–11].) Therefore the only issues remaining in this appeal relate to lands other than the forty-two sections which were the subject of the partial dismissal.

CIRI, on Mar. 19, 1980, moved to dismiss Chickaloon on the grounds that they have failed to allege a sufficient property interest in lands affected by the decision appealed to confer standing before the Board.

Contentions of Parties

Chickaloon

Chickaloon asserts three grounds for standing. First, in the decision

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appealed, BLM rejects Chickaloon's separate selections, and approves for conveyance to CIRI all the lands selected by CIRI villages, including those selected by Chickaloon, in one unsegregated parcel. Second, these commingled parcels are subject to CIRI's future determination as to which lands will be reconveyed to which village, and Chickaloon in the interim is a beneficiary and equitable title holder in the entire parcel. Third, Chickaloon is a party to the agreement of Aug. 28, 1976, between CIRI and its villages (hereinafter Region/Villages agreement) and is a member of the Cook Inlet Deficiency Land Management Association, which was organized to manage the land here in dispute.

Chickaloon asks the Board first to rule on the propriety of BLM's rejection of Chickaloon's separate land selections, and to clarify whether BLM, by rejection of individual village selections and conveyance to CIRI, in fact caused a merger of all such village selections subject to later reconveyance to individual villages by CIRI. If this was not the effect of the decision appealed, then Chickaloon seeks modification of the DIC to eliminate rejection of the individual village selections and hold such selections in abeyance pending conveyance to CIRI and reconveyance to the villages pursuant to § 4(a) of P.L. 94-456, *supra*, and the agreements of Aug. 28 and Aug. 31, 1976. Chickaloon asserts that the agreements are not private contracts outside the enforcement jurisdiction of the Department, because BLM relies on them in its decision. Chickaloon asserts that the Region/Villages agreement of Aug. 28, 1976, is incorporated in the Region/Government agreement of Aug. 31, 1976, as Appendix B thereto.

Chickaloon asserts that the Region/Villages agreement creates a Board comprised of representatives from each village to manage land conveyed to CIRI for reconveyance to the villages. All village representatives on the Board, including Chickaloon, can veto any decision affecting such village's land selections. The agreement with the APA for a feasibility study on the Susitna Dam Project is invalid because the dam project would have an environmental impact on the land selected by Chickaloon; Chickaloon was not notified of the meeting at which the agreement was signed; and had Chickaloon been notified, it would have vetoed the agreement. Chickaloon argues that the validity of the APA agreement is within the jurisdiction of the Board because the decision of BLM, here appealed, derives its authority from the Region/Government agreement of Aug. 31, 1976, which in turn incorporates the Region/Villages agreement of Aug. 28, 1976, providing for creation of the Board through which Chickaloon would have exercised its veto.

Cook Inlet Region, Inc.

CIRI has moved to dismiss Chickaloon on the grounds that they lack a property interest affected by the decision appealed even though the

decision specifically rejected selection applications filed by Chickaloon. CIRI contends that a rejection of Chickaloon selections, in order to convey the same lands to CIRI for reconveyance, was proper under the Region/Villages agreement. CIRI asserts that by signing the agreement, filing selections under the four methods referenced in the agreement, and participating in the Deficiency Land Management Association, Chickaloon waived any right to appeal conveyance under the terms of the agreement.

CIRI contends that since they must reconvey to each village based on the village's land selection and priorities, the selections are not merged into an aggregate parcel, as Chickaloon claims, but, on the other hand, claims involving reconveyance are not ripe for appeal until the reconveyance has taken place. Finally, CIRI argues that the agreement does not grant Chickaloon independent standing. CIRI contends that the only means by which Chickaloon can protect its property interest in the disputed lands is for the land to be conveyed to CIRI, for eventual reconveyance pursuant to the agreement between CIRI and its villages.

BLM

BLM asserts that Chickaloon has standing because its 12(a) selection is affected by the BLM decision here appealed. BLM contends that it was required by the Region/Government agreement, ratified by § 4(a) of P.L. 94–456, *supra*, to convey the disputed land to CIRI. CIRI's reconveyances to its member village corporations are governed by the Region/Villages agreement to which BLM is not a party.

As to Chickaloon's request that BLM hold its individual selections in abeyance pending CIRI's reconveyances, BLM responds that it cannot do so because upon conveyance to CIRI, BLM loses jurisdiction over the land and therefore cannot maintain control over that portion of the conveyance to CIRI which had originally been selected by Chickaloon.

Further, the Board cannot order reconveyance before final action on eligibility of the disputed villages, Salamatoff and Alexander Creek, because the Region/Villages agreement requires CIRI to hold lands in trust for the villages pending litigation on eligibility. As to Chickaloon's contention that its dispute is not a private one with CIRI, BLM disagrees on the grounds that the Department of the Interior was not a party to the Region/Villages agreement and the agreement is subject to change by the parties.

Statues, Regulations, and Agreements

Public Law 94–456, *supra*, provides in relevant part:

> Sec. 4.(a) The Secretary is authorized to convey lands under application for selection by Village Corporations within Cook Inlet Region to the Cook Inlet Region, Incorporated, for reconveyance by the Region to such Village Corporations. Such lands shall be conveyed as partial satisfaction of the statutory en-

titlement of such Village Corporations from lands withdrawn pursuant to section 11(a)(3) of the Alaska Native Claims Settlement Act (hereinafter, "The Settlement Act"), and with the consent of the Region affected, as provided in section 12 of the Act of January 2, 1976 (89 Stat. 1145, 1150), from lands outside the boundaries of Cook Inlet Region. This authority shall not be employed to increase or decrease the statutory entitlement of any Village Corporation or Cook Inlet Region, Incorporated. For the purposes of counting acres received in computing statutory entitlement, the Secretary shall count the number of acres or acre selections surrendered by Village Corporations in any exchange for any other lands or selections.

The authority and jurisdiction of the Board is set forth in regulations contained in 43 CFR 4.1(b)(5) which provide: "*Alaska Native Claims Appeal Board.* The Board considers and decides finally for the Department appeals to the head of the Department from findings of fact or decisions rendered by Departmental officials in matters relating to land selection arising under the Alaska Native Claims Settlement Act."

Standing before the Board is governed by regulations in 43 CFR 4.902 which provide "[a]ny party who claims a property interest in land affected by determination from which an appeal to the Alaska Native Claims Appeal Board is allowed, or an agency of the Federal Government, may appeal as provided in this subpart."

The Region/Government agreement of Aug. 31, 1976, between Cook Inlet Region, Inc., and Thomas S. Kleppe, then Secretary of the Interior, provides in pertinent part:

A. The Secretary shall, subject to valid existing rights, convey, as soon as reasonably possible, the surface and subsurface estate in all public lands described in Appendix A to CIRI.

B. CIRI shall reconvey the surface estate of such lands to the Village Corporations within the region pursuant to an agreement between CIRI and the affected Village Corporations, which agreement is attached as Appendix B to this agreement and which agreement may be modified by the parties thereto.

* * * * * * *

F. Only the following lands shall be conveyed to Village Corporations within Cook Inlet Region:

* * * * * * *

3) Lands conveyed by CIRI pursuant to this section; and pursuant to the Term and Conditions as clarified August 31, 1976.

G. CIRI shall have the power to administer the lands conveyed pursuant to this Agreement in accordance with the Region-Village agreement attached as Appendix B.

Appendix A lists, under the heading Talkeetna Mountains, Seward meridian, Alaska, all the lands which remain as the subject of this dispute; *i.e.:*

T. 32 N., R. 1 E.,
Sec. 33, all
T. 31 N., R. 2 E.,
Secs. 5, 6, 13, all
T. 31 N., R. 3 E.,
Secs. 18 and 23, all
T. 31 N., R. 4 E.,
Secs. 10, 15 and 20, all
T. 32 N., R. 1 W.,
Secs. 25 through 28, 31, 32, 33, and 36, all

Appendix B entitled, ANCSA SECTION 12(a) CONVEYANCE AGREEMENT BETWEEN COOK INLET REGION, INC.,

AND THE VILLAGE CORPORATIONS OF NINILCHIK, KNIKATNU, ALEXANDER CREEK, SALAMATOFF, TYONEK, CHICKALOON AND SELDOVIA [the Region/Villages agreement], provides in pertinent part:

WHEREAS:

1. There have arisen certain questions about the validity of selections of the Village Corporations in Cook Inlet Region in areas withdrawn by the Secretary under Section 11(a)(3) of ANCSA; and

2. Both the Cook Inlet Region and the Village Corporations desire a legislative resolution that shall insure that the Village Corporations receive their statutory entitlement under ANCSA; and

3. A legislative resolution has been proposed that would assure rapid conveyance to the Region and the Village Corporation of many lands within such deficiency areas; and

4. Such a resolution can be accompanied by fair administration of such lands by Cook Inlet Region and reconveyance to the Village Corporation as rapidly as possible:

IT IS THEREFORE AGREED THAT:

1. Cook Inlet Region, and the undersigned (hereinafter referred to as Village Corporations) support the legislation attached as Appendix A to this agreement or a version substantially conforming thereto;

2. There shall be formed a Board with one representative from each of the Village Corporations that has selected lands under Section 12(a) within the areas to be conveyed to Cook Inlet Region under the legislation described in Appendix A. It shall be the function of this Board exclusively to exercise the consent powers described in Paragraph 3(C) of this Agreement. Each Village Corporation shall designate its own representative to the Board. The term of the Board shall expire at the time total 11(a)(3) conveyance as required by ANSCA has been received by all the affected Village Corporations party to this agreement. The operation of the Board shall be governed by bylaws established within one year hereof. In the event of disagreement the matter shall be arbitrated under the rules of the American Arbitration Association.

3. Upon receipt of a conveyance of such deficiency land from the Secretary of the Interior pursuant to the legislation attached as Appendix A, Cook Inlet Region will reconvey the surface estate to such land to the Village Corporation entitled thereto under their Section 12(a) selections as rapidly as possible, guided by the following standards:

A. Unless the affected Village Corporations otherwise agree, their Sections 12(a) selections, including the specific tracts selected and the priorities listed in those selections shall govern.

B. Where there is no conflict among the Village Corporations arising from the alternate methods of filing (Methods A, B, C and D), see Appendix B, and where it is clear that a Village Corporation will be eligible for the land and will reach the parcel in its priorities, the Region shall immediately reconvey the land such reconveyance to be made within 10 working days of receipt of such conveyance to the Region from the Secretary.

C. Where, as a result of conflict in the above stated Section 12(a) filings or where, as a result of outstanding litigation concerning Village Corporation eligibility, * * * the right of a Village Corporation to immediate reconveyance is not certain, Cook Inlet Region shall hold and administer the lands to which the Village Corporation will ultimately be entitled in trust for the benefit of such Village Corporations, with the following limitations:

(i) Cook Inlet Region shall not develop or cause to be developed any portion of the surface or subsurface estate of any such lands held in trust by the Region without the consent of the Board described in Paragraph 2.

(ii) Such provision shall apply until the Section 12(a) entitlement of the Village Corporations is satisfied.

D. Cook Inlet Region shall reconvey such lands as soon as the uncertainties are resolved.

* * * * *

5. Except as specifically provided in this agreement, the provisions of ANCSA are fully applicable to this agreement, such provisions to be insured by the legislation attached.

The agreement is signed by the president or general manager of each village corporation listed in the caption and by the president of Cook Inlet Region, Inc.

DECISION

Standing

To have standing to appeal, Chickaloon must claim a property interest in lands affected by the decision appealed. (43 CFR 4.902.) It is undisputed that Chickaloon is entitled to receive conveyance to certain lands selected under § 12(a) of ANCSA (at a minimum, approximately 55,682 acres); that Chickaloon filed applications for the land here in dispute; that Chickaloon's individual land selections were rejected by BLM in the decision here appealed; and that the lands selected by Chickaloon were approved for conveyance to CIRI for reconveyance pursuant to P.L. 94–456, *supra*, and the agreements.

With regard to those lands for which it filed the selection applications rejected by BLM in the decision here appealed, the Board rules that Chickaloon has standing.

As the Board has stated in an earlier appeal (*Appeal of State of Alaska*, 3 ANCAB 196, 86 I.D. 225 (1979) [VLS 78–42]), the standing requirement in 43 CFR 4.902 focuses on an interest in land claimed by an appellant, and on the relationship between that interest and the determination being appealed. The interest claimed must be a property interest, and it must be affected by the determination.

The interest claimed by Chickaloon is the land selected for its land entitlement under ANCSA, to which the village will eventually receive patent. This is clearly a property interest within the contemplation of regulations in 43 CFR 4.902.

As to whether this property interest is affected by the decision appealed, that decision rejects the land selection application filed individually by Chickaloon, and approves conveyance of the same lands to CIRI for reconveyance.

Chickaloon does not dispute that P.L. 94–456, *supra*, authorizes the Secretary "to convey lands under application for selection by Village Corporations * * * to the Cook Inlet Region, Incorporated, for reconveyance by the Region to such Village Corporations." Rather, Chickaloon disputes the method by which BLM purports to implement the statutory amendment and its agreements. Chickaloon asserts that the form and language of the Decision to Issue Conveyance adversely affect their property interest.

Whether this decision by BLM is considered to affect Chickaloon adversely, as the appellant contends, or whether, as CIRI asserts, it af-

fects them favorably by removing procedural impediments to their receipt of land, it is clear that there is a legitimate question as to whether the decision does affect Chickaloon's interest in its land entitlement under ANCSA.

[1] Where land selections by a Cook Inlet village corporation pursuant to § 12(a) of ANCSA are rejected by BLM so that such lands may be conveyed to Cook Inlet Regional Corp. which is obligated to reconvey lands to the village under the terms of an amendment to ANCSA, the village corporation's interest in its rejected land selection and in its ultimate right to reconveyance of land constitutes a property interest affected by a determination of BLM, sufficient to confer standing under regulations contained in 43 CFR 4.902.

Accordingly CIRI's motion to dismiss Chickaloon for lack of standing is denied.

The issues raised by the appellant are:

(1) Whether BLM erred by rejecting Chickaloon's land selections under § 12(a) of ANCSA and approving conveyance of such lands to CIRI?

(2) Whether as a result of BLM's rejection of Chickaloon's land selections, the choice of lands to be subsequently reconveyed by CIRI to the village corporations lies within the discretion of CIRI or is controlled by each village's individual land selections?

(3) Whether the agreement between APA, CIRI and the CIRI villages of Tyonek, Salamatoff, Seldovia, Knik and Ninilchik is invalid because executed without the concurrence of Chickaloon as required by the bylaws of the Cook Inlet Deficiency Land Management Association?

With regard to the first issue, the Board affirms BLM; as to the second issue, the Board finds the decision here appealed does not adjudicate Chickaloon's rights of reconveyance from CIRI; as to the third issue, the Board finds it outside the jurisdiction of the Department of the Interior to adjudicate contractual disputes between third parties.

The agreement of Aug. 31, 1976, between CIRI and the Department specifically provides in paragraph A, "The Secretary shall, subject to valid existing rights, convey, as soon as reasonably possible, the surface and subsurface estate in all public lands described in Appendix A to CIRI." As previously noted the lands here in dispute are included in those described in Appendix A. Sec. 4(a) of P.L. 94-456, *supra*, enacted in part to implement this agreement, provides, "The Secretary is authorized to convey lands under application for selection by Village Corporations within Cook Inlet Region to the Cook Inlet Region, Incorporated, for reconveyance by the Region to such Village Corporations." Under the terms of the agreement, authorized by P.L. 94-456, BLM was obligated to convey Chickaloon's land selections to CIRI, for later reconveyance.

[2] Where the Secretary and Cook Inlet Regional Corp. execute an agreement setting forth the procedure by which land shall be conveyed to the regional corporation and to village corporations for villages within that region, and such procedure is authorized by Congress in an amendment to ANCSA, such agreement is binding on BLM and BLM is required to convey lands to the regional corporation pursuant to the terms of the agreement.

Chickaloon contends that BLM's rejection of its land selection prior to conveyance of the same lands to CIRI extinguishes Chickaloon's selection, resulting in a merger of all land selections, thereby leaving the choice of lands to be reconveyed to them entirely within the discretion of CIRI. Asserting that this result was not intended by the agreement between the Secretary and CIRI, Chickaloon seeks to have BLM hold its land selections in abeyance until CIRI reconveys these lands to Chickaloon.

The Board finds that BLM's rejection of Chickaloon's selection in the DIC was not an adjudication of Chickaloon's rights of reconveyance pursuant to P.L. 94–456, *supra*, and its agreements and therefore does not result in either extinguishment or merger of individual village land selections as between CIRI and its village corporations.

[3] When BLM rejects a village corporation's land selections for the purpose of conveying such lands to Cook Inlet Region Corp. for reconveyance pursuant to § 4(a) of P.L. 94–456, *supra*, and agreements between the villages and CIRI, the rejection extinguishes the right of the village corporation to receive title from the Federal Government to those lands selected but does not adjudicate or extinguish the right of the village corporation to receive title to those lands selected from CIRI.

[4] The rights of a village corporation in the Cook Inlet Region to receive title from Cook Inlet Region, Inc., to lands for which it had applied pursuant to § 12(a) of ANCSA are determined by the terms of § 4(a) of P.L. 94–456, *supra*, and associated agreements. It is clear from a review of the amendment and agreements that the applications for selection are the basis of the entire reconveyance process and that no action taken by BLM to clear its records for conveyance to CIRI could affect the reconveyance terms as contained in the amendment or agreements.

CIRI does not dispute this interpretation but, rather, asserts in their brief filed Mar. 19, 1980, that copies of each village's selections under the four alternate methods shall be used by CIRI to issue reconveyances, in accordance with the agreements of Aug. 28 and Aug. 31, 1976. Filed with CIRI's brief is an affidavit to this effect by their land manager.

As to Chickaloon's request that the Department of the Interior hold its land selections "in abeyance" pending reconveyance by CIRI, the

Board finds no authority for such action.

Chickaloon in effect seeks administrative enforcement of paragraph B of the Regional/Government agreement of Aug. 31, 1976, which provides: "CIRI shall reconvey the surface estate of such lands to the Village Corporations within the region pursuant to an agreement between CIRI and the affected Village Corporations."

However, the agreement provides no such enforcement mechanism. The manner in which CIRI is to reconvey to the village corporations is governed by the Region/Villages agreement of Aug. 28, 1976. While this agreement was referenced as governing reconveyance in the Region/Government agreement of Aug. 31, 1976, there is no authorization for the BLM to withhold or condition conveyance to CIRI in order to enforce the Region/Villages agreement.

There being no authority in the Cook Inlet Region/Government agreement to do otherwise, BLM's conveyance of lands to CIRI, pursuant to the amendment and agreement, must be affirmed and has the same legal effect as all conveyances of land by BLM under ANCSA.

As the Board has already ruled, interim conveyance and patent are documents of equal significance in the granting of title under ANCSA, and when interim conveyance has been issued, the Secretary and this Board lose jurisdiction over those interests in land which have been conveyed (*Appeal of James W. Lee*, *supra*). Upon conveyance of the disputed land to CIRI as required by the agreement of Aug. 31, 1976, BLM loses administrative jurisdiction over that land and cannot hold any part of it "in abeyance" in order to protect Chickaloon's interest in reconveyance from CIRI.

[5] Interim conveyance and patent are documents of equal significance in the granting of title under ANCSA and its amendments, unless such amendment provides otherwise. Sec. 4(a) of P.L. 94-456, *supra*, does not authorize the Secretary of the Interior to grant less than full legal title to CIRI. Therefore, when BLM issues interim conveyance to CIRI pursuant to P.L. 94-456, *supra*, the Secretary and this Board lose jurisdiction of those interests in lands which have been conveyed and cannot maintain control over such lands pending reconveyance by CIRI.

The foregoing conclusion on issues 1 and 2 are dispositive of this appeal. The Board notes for the record that Chickaloon also attacks the validity of the agreement executed by CIRI, other CIRI villages, and the APA, on the grounds that Chickaloon, under the bylaws of the Cook Inlet Deficiency Land Management Association, had the power to veto such agreement but was wrongfully deprived of the opportunity to do so.

[6] The Board finds that this matter is not within its jurisdiction and accordingly repeats its finding in the previous order of partial dismissal that contractual disputes be-

tween the appellant and other corporations are not appeals from findings of Departmental officials within the contemplation of jurisdictional regulations in 43 CFR 4.1(b)(5), nor can they be decided by this Board in connection with such appeals.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

APPEALS OF CEN-VI-RO OF TEXAS, INC.

IBCA-718-5-68 and IBCA-755-12-68
Decided *June 27, 1980*

Contract No. 14-06-D-5028, Specifications No. DC-6000; Contract No. 14-06-D-5244, Specifications No. DC-6130, Canadian River Project, Texas.

Revised claim, sustained in part.

1. Contracts: Disputes and Remedies: Burden of Proof

In a case remanded to the Board by the Court of Claims in which the Board had previously found that 1,013 concrete pipes were wrongfully rejected and the Court of Claims afforded the contractor an opportunity to show by record evidence that more pipes were so rejected, but the contractor offered no probative evidence of additional wrongful rejections, the Board declined to increase the equitable adjustment allowed in its original decision.

2. Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Equitable Adjustments

Where an earlier decision of the Board upheld the Government's interpretation of internal diameter tolerances in the manufacture of concrete pipe but the Court of Claims held that the tolerances were too strict and remanded the appeal to the Board for reconsideration of the equitable adjustment to include the effects of erroneous rejections of pipe for small diameters, the Board found that the effects of the Government's actions were so intermingled with the effects of actions for which the contractor was responsible that no formula could be devised to make a precise apportionment of the causes of inefficiencies. In the absence of any sound basis for a precise determination, the Board utilized a jury verdict approach to allow the contractor an equitable adjustment for the effects of the Government's actions early in the production of concrete pipe.

3. Contracts: Construction and Operation: Allowable Costs—Contracts: Disputes and Remedies: Burden of Proof

Where, upon remand from the Court of Claims, the Board was directed to make a specific finding as to whether, if pipes rejected for small diameters or marked as special hydros had been available for use, the supply of acceptable pipe would have been sufficient to allow pipe laying operations to continue and the contractor merely alleged that its average production of pipe was greater than the average number of pipe it was required to furnish to its pipe-laying subcontractor, the contractor's allegations obscured the fact that its own production and construction schedule called for specific sizes and lengths of pipe at specific times. The Board found that the contractor's total production was insufficient to maintain the contractor's own pipe laying schedule and therefore denied the contractor's claim for reimbursement of the payment

it made to settle the delay claim of the subcontractor.

4. Contracts: Construction and Operation: General Rules of Construction

Where the contractor claimed interest for the cost of borrowing money to finance the Government caused increase in costs under a contract awarded before Government regulations required an interest clause, the Board followed the Court of Claims' rule laid down in *Dravo Corp.* v. *United States*, 594 F.2d 842 (Ct. Cl. 1979), and denied the contractor's interest claims.

APPEARANCES: Mr. H. A. Federa, Secretary & General Counsel, Cen-Vi-Ro of Texas, Inc., c/o Raymond International, Inc., Houston, Texas, for Appellant; Mr. Henry J. Strand, Department Counsel, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PACKWOOD

INTERIOR BOARD OF CONTRACT APPEALS

These appeals come before the Board on remand from the Court of Claims for reconsideration to determine whether appellant is entitled an increased equitable adjustment as a result of the court's finding that the Government imposed unreasonably strict inside diameter tolerances for concrete pipe manufactured by appellant.

The claims of Cen–Vi–Ro of Texas, Inc., arose under two construction contracts of the Department of the Interior in the Canadian River Project. The project involved several construction contracts calling for a total of 322 miles of pipeline, pumping plants and related work to furnish water to 11 cities in the Texas Panhandle. Cen-Vi-Ro was the prime contractor in Contract No. 14–06–D–5028, Specification DC–6000, which provided for pipe manufacture, pipe laying, and related work for approximately 90 miles of pipeline. The reinforced concrete pipe was manufactured by Cen–Vi–Ro and all other work was subcontracted to R. H. Fulton. In Contract No. 14–06–D–5244, Specification 6130, R. H. Fulton was the prime contractor for construction of approximately 140 miles of pipeline and Cen-Vi-Ro was the subcontractor for the manufacture of concrete pipe. The estimated contract price in DC–6000 was $12,464,227 and in DC–6130 it was $8,785,519.02.

Cen-Vi-Ro of Texas, Inc., was organized as a wholly-owned subsidiary of Raymond International, Inc., for the purpose of bidding on contracts in the Canadian River Project. The name is derived from centrifugation, vibration, and rotation, the three major steps in a pipe manufacturing process developed by a sister corporation in California. Cen-Vi-Ro had no manufacturing facilities when it was awarded its first contract. It built facilities at Plainview, Texas, referred to as the north plant, to make larger sized pipe for DC–6000 and later built facilities, referred to as the south plant, to manufacture smaller diameter pipe. Production of pipe in the north plant began on

May 29, 1964, and in the south plant on Apr. 2, 1965.

At the beginning of production at the newly constructed north plant, some machine operators and supervisory personnel were brought in from California, but the principal labor supply was derived from the local area and many of the new employees were inexperienced in production work.

From the beginning of production to May 1965, Cen-Vi-Ro experienced a number of production difficulties including problems in making reinforcement cages, in using the 20-foot spinning machine, in fallouts where sections of concrete fell or pulled away from the reinforcing steel, in rocky bells where aggregates were exposed in bell areas, with longitudinal and circumferential cracks, with unconsolidated concrete in bell and spigot areas, and with flaking and cracking interiors. In addition, by Oct. 15, 1964, the Government had marked 1,045 pieces of pipe as defective because of small diameters. By Oct. 17, 1964, 477 pipes had been marked for special hydrotests. Total production through October 1964 was approximately 3,200 units. As a result of a shortage of pipe, pipe laying was suspended on Nov. 21, 1964, and was resumed on May 10, 1965.

Cen-Vi-Ro took a number of actions to reduce the number of rejections for small diameters, including decreasing the quantities of mix, milling down the end rings on the forms, building up the rollers and grinding the interiors of rejected pipe. By December 1964, small diameters were about 3 percent of production and by January 1965 small diameters were no longer a problem. Correction of the small diameter problem was one cause of other problems with production of pipe having flaking and scaling interiors. Production of pipe with bad interiors was most prevalent in February and March 1965. About Apr. 12, 1965, the Government relaxed its criteria for measuring internal diameters of the pipe and began accepting pipe in accordance with appellant's interpretation of the specification. The production of pipe with bad interiors had almost disappeared by May 1965.

Appellant submitted claims totaling $2,147,554 under DC–6000 and $976,926 under DC–6130, contending that it had been subjected to more rigorous standards for the production of pipe than the contract required.[1]

In its earlier opinion, the Board allowed appellant $218,180.83 on DC–6000 claims and $5,348.95 on DC–6130 claims.[2] Following the Board's decision, Cen-Vi-Ro instituted suit in the Court of Claims, which found that the Board's interpretation of the internal diameter tolerances was not in accordance with the specification. The court remanded the case to the Board for reconsideration of the equitable adjustment in accordance with the court's decision.

[1] The statement of facts is summarized from pages 2 through 9 of the Trial Judge's proposed decision for the Court of Claims, which pages were adopted by the Court without change in the order of remand.

[2] Cen-Vi-Ro of Texas, Inc., IBCA Nos. 718–5–68 and 755–12–68 (Feb. 7, 1973), 80 I.D. 29, 73–1 BCA par. 9903.

The Board notes that the claims under both DC–6000 and DC–6130 were consolidated before the Court of Claims and both were remanded although no small diameter were encountered under DC–6130. Since the court did not overrule the Board's findings with respect to DC–6130 and production of pipe for that specification was not afflicted with small diameter problems, reconsideration of the equitable adjustment will be limited to determining the effect of the small diameter interpretation on pipe production under DC–6000.

After remand to the Board, appellant submitted its revised claim in the following form:

Item I. Disruption Period May 15, 1965 through September 1965. $309,821.96×15=$46,473.29 (+$309,821.96)	$356,295.25
Item II. Disruption Period September 1, 1964 through May 15, 1965, $510,842.82×.15=$76,626.42 (+$510,842.82)	587,469.24
Item III. Cost of Rejected Pipe. $174,916.81X.15=$26,237.52 (+$174,916.81)	201,154.33
Item IV.A. Substituted Pipe. $17,554.91×.15=$2,633.24 (+$17,554.91)	20,188.15
Item IV.B. Payment to Subcontractor for Delay in Pipe Laying. $100,000 ×.15=$15,000 (+$100,000)	115,000.00
Item IV.C. Cost of Land Rented for Pipe Storage. $18,000×.15=$2,700.00 (+$18,000)	20,700.00
Item IV.D. Costs Resulting from Reduction of the Lot Test Period. $1224.96×.15=$183.74 (+$1224.96)	1,408.70
Total	1,302,215.67

Although the contracts in question were awarded long before procurement regulations required an interest clause, appellant has also claimed interest for the cost of borrowing money to perform the extra work caused by the Government's actions.

Before addressing the elements of appellant's claim, we will first examine appellant's motions to expunge evidence.

Appellant's Motions to Expunge Evidence

At the hearing in Houston, Texas, after remand to the Board the Government offered in evidence, as Government Exhibit 160, copies of two letters which Cen-Vi-Ro had furnished to the Government on discovery. Appellant objected to the introduction of the exhibit, claiming that the two letters were privileged communications covered by the attorney-client privilege (Tr. 2489). The letterhead of the first letter identified its author as both secretary and general counsel of Raymond International, the parent corporation of Cen-Vi-Ro. It was not clear from the face of the letter in which capacity the author was acting when he prepared the letter. The second letter in response to the inquiries in the first set forth certain preliminary cost figures re-

garding Cen-Vi-Ro's claim. Since neither letter gave any indication that the parties were attorney and client, the exhibit was admitted over appellant's objection.

After the hearing, appellant moved the Board to expunge Exhibit 160 from the record since the general counsel had been authorized by the president of the company to act as its attorney in pursuing its claim against the Government. The motion was denied and appellant asked for reconsideration of the ruling.

On reconsideration, the Board now finds that, although the letters do not clearly show that they were written as a part of an attorney-client relationship, the letters do not clearly rule out such a possibility. Accordingly, Government's Exhibit 160 is hereby stricken and expunged from the record as a privileged communication between attorney and client.

With respect to Government Exhibit 179, entitled Scheduled and Actual Pipe Production and Construction, appellant objected to its admission on the ground that it was not an original document and appellant had not had time to examine the documents from which the summaries were derived in order to verify the accuracy of the exhibit (Tr. 2939). The scheduled production and scheduled construction figures were derived from Exhibit 77 which was received in evidence at the first hearing. The backup documentation for the remaining figures was present in the hearing room and the ruling on admissibility of the exhibit was deferred until appellant could check the documentation (Tr. 2941). At the conclusion of the hearing, appellant had not checked the documentation. Exhibit 179 was admitted but the record was left open to give appellant an opportunity to examine the documentation and furnish any different figures it might derive therefrom (Tr. 3034).

After the conclusion of the hearing, the Government furnished appellant a corrected copy of Exhibit 179 which increased by 20 feet the cumulative totals of 66-inch "A" wall pipe which were accepted for shipment in September and October 1964. When Appellant responded that it had no objection to Exhibit 179, the Government then furnished to the Board a corrected copy with the two corrections made in red ink.

Appellant thereafter moved the Board to strike the corrected copy of Exhibit 179 and the letter which accompanied it on the ground that it was an attempt by the Government to place matters in evidence after the record was closed. Appellant's position is correct. The record was left open for appellant to examine the backup data for Exhibit 179 and to submit any different figures it might derive therefrom, but the record was not left open for the Government to submit further revisions of the exhibit.

Accordingly, the Board hereby strikes the corrected copy of Exhibit 179, and the cover letter which furnished it, from the record. As indicated below, no finding of fact with respect to the cumulative totals

of pipe accepted for shipment in September and October 1964 is necessary for the Board's decision in any element of appellant's claim.

I. Disruption Period from May 15, 1965, through September 1965

In its revised claim before the Board, Cen-Vi-Ro claimed disruption costs for all 2,240 pipe units rejected for scaling during the May 15, 1965, inventory, and also for 214 pipe units rejected for fallouts, 233 pipe units rejected for rocky bells, and 500 special hydrotests.

[1] Cen-Vi-Ro's claim for disruption costs for all 2,240 pipe units rejected for scaling was presented to the Court of Claims. Pages 27 and 28 of the trial judge's recommended decision, which were affirmed and adopted by the court without modification, contain the following observations and ruling:

> Inasmuch as 1,013 pipes previously rejected were accepted in September 1965, the IBCA considered that it was highly unlikely that those units required any substantial repairs and accordingly ruled that they should not have been rejected. Plaintiff contends that an equitable adjustment should have been permitted for disruption costs on all 2,240 pipes rejected for scaling during the May 15 inventory, rather than the 1,013 units allowed by the IBCA. Although the bureau's misinterpretation of the small diameter tolerances clearly is one cause in the sequence that led to rejections for flaking and scaling, rejections classified as such were also made because of bad interiors and for cracking, and the record is not clear as to the extent such conditions were present in additional pipes. Unless plaintiff on remand can provide record information sufficient to establish entitlement to an increase equitable adjustment, because the additional pipes were rejected wrongfully, this ruling of the IBCA should stand.

Cen-Vi-Ro did not take advantage of the opportunity afforded it by the Court of Claims and it presented no record information to establish that more than 1,013 pipe units were wrongfully rejected. Instead of record information, Cen-Vi-Ro merely offered the argument that the Board's original opinion did not consider that the Government should be responsible for pipes with defects which flowed from Cen-Vi-Ro's efforts to eliminate small diameter pipes.

The Board's finding that efforts to avoid small diameter pipes were the primary cause of flaking and scaling interiors means only that those efforts were first in order of occurrence. As stated by the court, above, the Government's misintrepretation of the small diameter tolerances clearly is one cause in the sequence that led to rejections for flaking and scaling. It is equally clear that other causes were present, but appellant's repeated allegations that rejection of all 2,240 pipes flowed from the small diameter problem do not resolve the question whether more than 1,013 units were improperly rejected. Allegations are not a substitute for proof.

In view of the failure of proof, the Board's previous ruling that 1,013 pipes were improperly rejected for scaling is found to be correct in accordance with the guide-

lines given in the court's decision cited above.

Cen-Vi-Ro also claimed disruption costs for 214 pipes rejected for fallouts and 233 pipes rejected for rocky bells at the May 15, 1965, inventory. At the hearing held after remand from the Court of Claims, appellant introduced testimony from Mr. William Provan, President of Cen-Vi-Ro Concrete Pipe and Products, a wholly owned subsidiary of Concrete Pipe and Products Co., of Richmond, Virginia, companies which have no association with Cen-Vi-Ro of Texas, Inc., the appellant (Tr. 2532–2608). Although appellant did not fully articulate its intention, it apparently intended to present Mr. Provan as an expert witness with respect to production of pipe by the Cen-Vi-Ro process. On cross-examination, Mr. Provan testified that he was not an engineer, and that his education had been in the field of business administration. His only training in concrete mixes and pipe production were various short courses in production given by the American Concrete Pipe Association. Mr. Provan stated that he did not consider himself to be an expert on concrete mixes and he did not hold himself out as an expert on engineering matters (Tr. 2560–2561). Mr. Provan further testified that he had never used a 16-foot machine or a 20-foot machine in his operations. His experience was limited to use of 12-foot machines except for one 16-foot machine which his company manufactured and sent to Spain (Tr. 2594–2595). Appellant's Exhibit V shows that the machines used in this contract were 16-foot and 20-foot machines. The expertise of Mr. Provan appears to be in the areas of management and administration. The Board attaches little weight to his testimony that rocky bells and fallouts are two possibilities if the pipe forms are not overfilled and if the interior of the pipe is not rolled (Tr. 2538).

The Government introduced evidence in the form of charts derived from inspection records which show that fallouts and rocky bells occurred at random throughout the period of pipe production and were not bunched in the period when the pipe with flaking and scaling interiors were being produced (Gov. Exhs. 167, 168, 169). Appellant objected to introduction of these exhibits, contending that they used a variety of records which over-emphasized the defects in the early periods and under-emphasized defects in later periods. Appellant declined the opportunity to inspect the original records in order to produce its own summary and is not in a position to criticize the accuracy of the Government's summary of defects. These exhibits are significant, not for the exact numbers of defects, but for the fact that they show that fallouts and rocky bells occurred throughout the pipe production and were not clustered in the period when scaling and flaking interiors were being produced.

Accordingly, the Board finds that the record will not support the con-

clusion that all rocky bells and fallouts resulted from efforts to avoid making small diameter pipe. The Board further finds that appellant has offered no evidence to enable the Board to find that some specific number, less than the total number of rocky bells and fallouts, resulted from efforts to avoid making small diameters.

In view of appellant's failure to provide record information that additional pipes were wrongfully rejected, the Board, following the ruling of the court, finds the Board's original decision, that 1,013 units were wrongfully rejected, to be correct.

In its previous decision, the Board made a detailed examination of the claim for an equitable adjustment for special hydrotests that were not authorized by the contract. The Board sustained Cen-Vi-Ro's claim for compensation for conducting 283 special hydrostatic tests, but found that all other hydrostatic tests were conducted in accordance with the contract and were not compensable except to the extent that conducting special hydrostatic tests contributed to the disruption allowed for improper rejection of the 1,013 pipe units. Appellant has shown no basis for further equitable adjustment based on special hydrotests.

Pursuant to the court's ruling the Board affirms its earlier decision that appellant is entitled to an equitable adjustment for disruption caused by improper rejection of 1,013 pipe units on May 15, 1965. The Board denies appellant's claim for an increased equitable adjustment for the period May 15 through September 1965, for failure of proof that additional pipe were wrongfully rejected.

II. Disruption Period September 1, 1964, through May 15, 1965.

[2] The finding by the Court of Claims that the Board was in error in its interpretation of the specification relative to permissible diameters noted that the effects of the error on appellant's claim are not clear. Cen-Vi-Ro was allowed to use pipe that accorded with its interpretation of the contract and there were no final rejects for small diameters.

Appellant offered testimony of Mr. Roy Silva, office manager and accountant, who testified that the books and records of Cen-Vi-Ro were not kept in a manner which would enable it to establish its actual costs in support of an equitable adjustment (Tr. 2653–2659). In such case, the court directed the Board to allow appellant to support its claim for an equitable adjustment by other evidence, exclusive of the total cost method, which shows its reasonable costs (Court's Order of Remand, p. 1).

For reasons which it did not disclose, appellant chose not to offer any evidence as to its reasonable costs. Instead, it relied on the formula, used by the Board in the earlier decision to determine the loss of efficiency resulting from wrongful rejection of 1,121 pipes to deter-

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mine the disruption resulting from wrongful rejection of pipe for small diameters and for other defects which it alleged were the result of its efforts to avoid making small diameter pipe. Appellant claimed an equitable adjustment of $458,478.52, plus 15 percent for indirect costs, if the special hydrotests are not considered, and if hydrotests are considered, $510,842.82 plus 15 percent for a total of $587,469.24 for disruption during the period Sept. 1, 1964, through May 15, 1965.

The difficulties presented by appellant's approach are formidable. In the first instance, the Board was using as a base period the 4½-month period following Oct. 1, 1965, and comparing it with the 4½-month period immediately preceding Oct. 1, 1965, to determine the excess of man-hours in the disruption period over those in the base period. In doing so, the Board assumed that inefficiencies in the disruption period were primarily related to rejection of pipe during the May 15 inventory and observed that such assumption may not have been accurate. For the limited purpose for which it was employed, however, we considered it to be the most appropriate method of determining the equitable adjustment. In the present instance, appellant asks the Board to use the same base period of 4½ months beginning on Oct. 1, 1965, and to compare it with a much earlier 8½-month period that is separated from the base period by 4½ months. There was no event on Sept. 1, 1964, comparable to the May 15, 1965, inventory which resulted in rejection of a large number of pipe, some wrongfully. As enumerated by the court on page 4 of the trial judge's opinion, appellant had a number of production difficulties unrelated to the rejection of pipe for small diameters.

In view of these difficulties, we are unable to assume that all inefficiencies in the disruption period were the result of rejection of pipe.

Appellant's Exhibit Z shows that the number of man-hours per ton of pipe production dropped steadily in September and October from a peak in August 1964. After the extent of the small diameter problem became apparent in October, the number of man-hours per ton of pipe production climbed back almost to the high level of August and remained high for the remainder of the period until May 15, 1965. The Government objected to appellant's labeling of the excess man-hours as disruption (Tr. 2638). The label is not inflammatory, it is merely incomplete since it does not identify the cause of the disruption. The evidence of record does not support Cen-Vi-Ro's conclusion that all of its inefficiencies were the result of disruption of its operation by the Government. On the contrary, as the Board found in its earlier decision and the court agreed, Cen-Vi-Ro experienced many difficulties during this period, including cage manufacturing problems, gyro area concrete which was unconsolidated, longitudinal and circumferential cracks, unconsolidated concrete in bell and spigot areas, fallouts, rocky

bells, as well as the small diameters and an undetermined percentage of scaling and flaking interiors caused by efforts to avoid the manufacture of small diameter pipe. The Board's earlier decision found that Cen-Vi-Ro is responsible for a substantial portion of the cost overruns and the court stated that such conclusion was not refuted by appellant's evidence. Appellant introduced no new evidence in this area, so the Board's task is to attempt to determine the impact of the erroneous rejection of small diameter pipe and other damage which may reasonably be attributed to appellant's efforts to avoid making small diameter pipe.

As indicated above, there are too many variables and too many elements of the excess costs that are the responsibility of Cen-Vi-Ro to allow a simple comparison of the man–hours in the base period with the man–hours required for production in the disruption period. While it is clear that the Government's erroneous rejection of pipe for small diameters and appellant's subsequent efforts to avoid making such pipe caused disruption to some degree, the full extent of the disruption caused by the Government is essentially unknown and unknowable on the basis of the record. To attempt to devise a formula for the disruption based on assumptions, which are then intermingled with known figures in a calculation, would lend an inappropriate aura of precision to what is in reality a process of estimating similar to a jury verdict.

Taking into consideration that the Government's misinterpretation of the small diameter tolerances was one cause in the sequence that led to rejections for flaking and scaling but that there were other causes of bad interiors not attributable to the Government, that appellant failed to submit probative evidence that fallouts and rocky bells were directly related to reasonable efforts to correct the small diameter problem, that improper special hydrotests caused some disruption and that there were no final rejects for small diameters, the Board finds, in the nature of a jury verdict, that appellant is entitled to an equitable adjustment of $262,500. This amount includes an allowance for indirect costs. No allowance is made for profit in view of the "extras" clause included in the contract, as the Board found in its earlier decision. The question of interest will be discussed in a later section of this opinion, below.

III. Cost of Rejected Pipe

As in the two previous sections of its claim, appellant has stated its claim in the broadest possible terms, claiming an equitable adjustment of $201,154.33 for direct and indirect costs of all pipe finally rejected for fallouts, rocky bells, and scaling and bad interiors. Appellant has again alleged, without any probative evidence to support its allegation, that all of the above defects flowed from its efforts to avoid making small diameter pipe.

In view of the finding of fact in Section I of the appellant's claim that appellant failed to come forward with sufficient probative evidence to show that rocky bells and fallouts were caused by its efforts to avoid small diameters, the Board denies the portion of this claim that relates to fallouts and rock bells.

Appellant has also claimed an equitable adjustment for all pipe finally rejected for scaling and bad interiors, a total of 332 pipes. Although we consider ourselves bound by the Board's previous finding that efforts to avoid small diameters were a primary cause of the production of pipe with flaking and scaling interiors, that finding did not mean that all flaking and scaling was caused by such efforts. The court pointed out that the Government's misinterpretation of the small diameter tolerances was one cause in the sequence that led to rejections for flaking and scaling but there were other causes of bad interiors such as cracking which were unrelated to the small diameter problem. In connection with this claim appellant has made no attempt to identify and segregate the bad interiors caused by the small diameter problem from the bad interiors resulting from other causes. Although it appears that some of the final rejects were the result of efforts to avoid small diameters, the precise number cannot be determined on the basis of the present record. Accordingly, the Board finds, in the nature of a jury verdict, that appellant is entitled to an equitable adjustment of $43,600 for the direct and indirect costs of the rejected pipe caused by the Government's imposition of overly strict tolerances for measuring inside diameters.

IV. A. Cost of Substituted Pipe

Appellant submitted a claim of $17,554.91 for the difference in cost between larger diameter pipe substituted for smaller size pipe as a result of the Government's erroneous application of small diameter tolerances. Appellant alleges that 324 pieces of larger pipe were substituted, based on the Government's authorization of the substitution by letter of Nov. 23, 1964 (Exh. 5–D). Appellant's claim fails to take into account the closing down of the pipe laying operation on Nov. 21, 1964, and the relaxation of the small diameter tolerances when pipe laying was resumed on May 10, 1965.

Government Exhibit 165 shows that the "as built" drawings, prepared by the Government after completion of the construction, identify only five 66-inch pipe substituted for 60-inch pipe and 160 60-inch pipe substituted for 54-inch pipe.

The Board's previous finding that 1,000 small diameter pipe were authorized for substitution was not a finding as to the number actually substituted. The Board now finds that only 165 pipe were substituted and that all others were laid in accordance with their nominal diameters. The Board further finds that five 66-inch pipe were substituted for 60-inch pipe and that 160 60-inch pipe were substituted for

54-inch pipe. Based on appellant's production reports (Exhs. V–1 and V–2) the Board finds that the 66-inch pipe weighed 15.463 tons per piece while the 60-inch pipe for which it was substituted weighed 12.544 tons per piece for 20-foot length pipe.

The 60-inch pipe substituted for 54-inch pipe came in 16-foot lengths and weighed 10.035 tons and 8.211 tons, respectively.

The Board finds that appellant is entitled to an equitable adjustment for the cost of the extra weight of the substituted pipe computed as follows:

(15.463–12.544) x 5 =
14.595 excess tons of 66-inch pipe
(10.035– 8.211) x 160 =
291.84 excess tons of 60-inch pipe
Total excess tons = 306.435

The Board had previously found the cost per ton for the pipe was $21.97. This figure multiplied by 306.435 excess tons equals $6,732.37 for the direct cost of substituted pipe. Adding 15 percent for indirect costs brings the total equitable adjustment to $7,742.22 for substituted pipe.

IV. B. Responsibility for Delay of Pipe Laying Subcontractor

[3] On page 26 of the trial judge's decision, the Board is directed to make a specific finding as to whether, if the pipes rejected for small diameters or marked as special hydros had been available for use on Nov. 21, 1964, the supply of acceptable pipe would have been sufficient to permit pipe laying operations to continue.

Appellant alleged that an average of 18,986 linear feet of pipe per month was required to keep the pipe laying subcontractor supplied. Appellant's Exhibit Y, based on the assumption that 5,000 feet per week would be laid, purports to show that if pipe rejected for small diameters or marked for special hydros had been available, Cen-Vi-Ro could have met the average requirement for pipe laying. Appellant's use of average figures obscures the fact that its construction schedule did not allow the furnishing of an average number of average sized pipe each month. Appellant's construction schedule called for a specific number of linear feet of specific sizes of pipe at specific times (Govt. Exh. 77).

Government Exhibit 179 sets forth the cumulative monthly totals for scheduled production, actual production, scheduled construction, actual construction, the amount of pipe accepted for shipment, and the small diameters not accepted for shipment. At the end of November 1964 Cen-Vi-Ro had produced 1,560 linear feet of 72-inch pipe and 800 linear feet had been rejected for small diameters. No construction of this size pipe had been scheduled, so rejection of the small diameters in this size had no effect on the pipe laying operation. Production of 66-inch "B" wall pipe had reached 600 linear feet at the end of November and 440 linear feet had been rejected for small diameters. Scheduled con-

struction was 2,200 linear feet, however, and even if all pipe produced had been accepted, there would have been a shortage of 1,600 linear feet of this type of pipe.

Production of 66-inch "A" wall pipe was the area of the greatest difficulty. At the end of November only 15,720 linear feet had been produced while the scheduled construction was 57,720 linear feet. Rejection of 3,500 linear feet of pipe for small diameters was not a significant factor in Cen-Vi-Ro's inability to produce pipe to meet the construction schedule for laying pipe of this size.

Production of 60-inch pipe had reached a total of 10,704 linear feet by the end of November, while scheduled construction was only 5,143 linear feet. None of the pipe had been accepted for shipment for a variety of defects, so even the availability of the 2,304 linear feet of pipe rejected for small diameters would not have enabled Cen-Vi-Ro to maintain the pipe laying schedule for this size of pipe.

For 54-inch pipe, Cen-Vi-Ro had achieved a total production of 40,128 linear feet by the end of November, of which a total of 11,664 linear feet had been rejected for small diameters. No pipe laying for this size was scheduled until March 1965 in the original construction schedule, but apparently because of lack of other sizes of pipe the March construction was moved forward to October and continued until pipe laying operations were suspended.

Based on the foregoing, the Board finds that even if all the pipes rejected for small diameters or marked as special hydros had been available on Nov. 21, 1964, the supply of acceptable pipe would have been insufficient to permit pipe laying operations to continue in accordance with appellant's construction schedule. In the absence of any evidence of record, we decline to speculate whether further adjustments to the construction schedule, such as moving up the laying of 54-inch pipe, could have been made in order to sustain some level of construction.

Cen-Vi-Ro's argument, based on the pipe production shown in Appellant's Exhibit V–1, is that total production for the weeks ending Nov. 29, 1964, through Jan. 31, 1965, exceeded the average weekly amount of pipe necessary to sustain construction. This argument assumes, without citing any evidence, that all of the pipe produced would have been available for laying if the Government had not imposed its overly strict tolerances on small diameters. The argument ignores the requirement for specific sizes of pipe, in specific linear quantities, and at specific times in order to maintain the construction schedule.

The Board finds that pipe laying was shut down on Nov. 21, 1964, because of an overall shortage of acceptable pipe, particularly of the 66-inch "A" wall variety. The Board further finds that the shutdown was not a result of the Government's erroneous rejection of pipe for small diameters. Accordingly, the Board denies Cen-Vi-Ro's claim for reimbursement for the $100.000 payment made to settle the delay claim of

R. H. Fulton, the pipe laying subcontractor.

IV. C. Cost of Land Rented for Pipe Storage

Appellant has claimed $18,000 for the actual cost of leasing 17 acres of land for pipe storage for a period of 3 years beginning on Feb. 3, 1965, and ending Feb. 2, 1968. Appellant attributed the necessity for leasing 17 acres to the need to accommodate erroneously rejected pipe.

Appellant's production-construction schedule (Exh. 77) shows that for every size and type of pipe, the maximum scheduled monthly construction greatly exceeded the maximum scheduled monthly production and extensive stockpiling was planned. For example, out of a total of 83,840 linear feet of 54-inch pipe scheduled to be produced, appellant's original schedule called for 75,504 linear feet to be produced and in storage before the construction began. For 72-inch pipe, production of 20,384 linear feet was scheduled over a period of 12 months before any construction was scheduled. There is no evidence of record to show that appellant could have stored the amounts of pipe planned for inventory without making arrangements such as the lease of the 17 acres in question here.

The additional burden placed on storage facilities by the shutdown of pipe laying operations on Nov. 21, 1964, was not a result of any Government action in view of our finding, above, that the availability of small diameter pipe and pipe designated for special hydros would not have enabled appellant to meet its construction schedule. The claim for the cost of land rented for pipe storage is denied.

IV. D. Costs Due to Reduction of the Lot Test Period

Appellant claimed costs resulting from a decrease in the lot test period from 1 work week to 3 days. In its previous decision, the Board found that there were 377 lot tests on 345 lots of 16-foot pipe, an excess of 32 lot tests, and appellant now claims that the 32 additional tests resulted from the Government's imposition of the strict inside diameter tolerances. For the 20-foot pipe, the Board made no finding as to the number of tests in excess of the contract requirements. Appellant now estimates that 56 excess tests were conducted due to the reduction of the lot test period.

The Board found that 5 man-hours were required for each hydrotest at a cost of $2.84 per man-hour. Appellant claims $1,224.96 for the costs involved in the increased number of tests due to the reduction of the test period (88 x 5 x $2.784).

As indicated above in our discussion of the disruption claim for the period Sept. 1, 1964, to May 15, 1965, the use of unsupported figures or theoretical figures, intermingled with and multiplied by actual costs or average manpower figures, lends a false aura of certainty to a process of calculation which is really an estimation process. In this instance, the facts lend themselves more to

the jury verdict approach. Appellant has simply assumed that the reduction in the lot test period flowed directly from the efforts to avoid small diameters.

Appellant's approach ignores the statement on page 4 of the trial judge's opinion, which notes that Cen-Vi-Ro had a number of production difficulties in addition to small diameters. While it is apparent that some of appellant's difficulties resulted from efforts to avoid small diameters, it cannot be assumed, in the absence of evidence of record, that all of the difficulties encountered by appellant resulted from this one cause.

Accordingly, the Board finds in the nature of a jury verdict that appellant is entitled to an equitable adjustment of $850 for the increased costs of lot testing due to the unwarranted reduction of the lot test period. The equitable adjustment includes an allowance for indirect job costs.

V. Interest on Borrowed Money as Cost of Work

[4] Appellant claimed interest for the cost of borrowing money to perform the extra work caused by the Government's actions. In its earlier decision, the Board denied the claim for interest since appellant had not shown that interest was incurred specifically to fund a change.

Appellant has renewed its claim for interest, citing *Bell* v. *United States*, 186 Ct. Cl. 189 (1968). In that case, however, the court stated that the contractor was entitled to recover only the actual interest paid on borrowings necessitated by the change.

In *Framlau Corp.* v. *United States*, 215 Ct. Cl. 185, 196–99 (1977), the court reaffirmed *Bell*, above, but held that a board of contract appeals could only award interest costs as a part of an equitable adjustment for changed work where a contractor actually paid the interest and could prove that the borrowing was forced or otherwise made necessary by the changed work. The evidence offered by appellant shows that all funds used to perform the two contracts in question, except for an initial capital of $1,000, was borrowed from the parent company, Raymond International, Inc., and has not been repaid (Tr. 2613, 2676–77, 2682). Appellant had a net deficit of over $3,578,000 and remains in this position (Tr. 2684).

In a more recent case, *Dravo Corp.* v. *United States*, 594 F.2d 842 (Ct. Cl. 1979), the Court of Claims rejected a line of cases decided by the Armed Services Board of Contract Appeals which allowed interest on nonspecific borrowings or imputed interest for the use of equity capital. The court repeated its position that it requires that a clear necessity for borrowings occasioned by the change be proven and a mere showing of a history of business borrowings and a course of dealings with various banks during the time frame at issue is insufficient to prove a claim for interest.

This Board has not followed the line of cases represented by *Ingalls Shipbuilding Division, Litton Systems, Inc.*, ASBCA No. 17579, Feb. 17, 1978, 78–1 BCA par. 13038, cited

by appellant in support of its interest claim. This matter is before the Board on remand, and the Board will follow the Court of Claims.

Since appellant proved only a general course of borrowing from the parent corporation and has made no showing that any specific borrowing was the result of a change in the contract, the claim for interest is denied.

Summary

The Board reaffirms the amounts allowed in its original decision, $218,180.83 under DC–6000 and $5,348.95 under DC–6130. In addition, on reconsideration of the equitable adjustment in accordance with the decision of the Court of Claims, the Board has made the following allowances:

For disruption from September 1, 1964, to May 15, 1965:	$262,500.00
Cost of rejected pipe	43,600.00
Cost of substituted pipe	7,742.22
Costs due to reduction of lot test period	850.00
Total	314,692.22

The remainder of appellant's revised claim for $1,302,215.67 is denied. Appellant's claim for interest is denied.

G. HERBERT PACKWOOD
Administrative Judge

WE CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge

RUSSELL C. LYNCH
Administrative Judge

WILSON FARMS COAL CO.

2 IBSMA 118

Decided *June 27, 1980*

Appeal by Wilson Farms Coal Co. from a Feb. 8, 1980, decision by Administrative Law Judge David Torbett sustaining Notice of Violation No. 79–II–5–21 in Docket No. NX 9–88–R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Permittees

A permittee is a proper party to be issued a notice of violation under the Act and a lease agreement between a permittee and a private party cannot relieve the permittee from its responsibilities under the Act.

APPEARANCES: Ted Q. Wilson, Esq., Oneida, Tennessee, for Wilson Farms Coal Co.; Mark Squillace, Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY THE BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Wilson Farms Coal Co. (Wilson Farms) has appealed from a Feb. 8, 1980, decision of Administrative Law Judge David Torbett sustaining Notice of Violation No. 79–II–5–21.[1] Judge Torbett concluded

[1] The notice charged three violations:
Violation No. 1—Failure to transport, backfill, compact and grade all spoil material to eliminate all highwalls, spoilpiles and depres-
(Continued)

that Wilson Farms was the proper party to be issued the notice. For the reasons stated below, we affirm that decision.

Factual and Procedural Background

On June 19, 1979, pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act),[2] an Office of Surface Mining Reclamation and Enforcement (OSM) inspector visited the Black Oak Mine in McCreary County, Kentucky, and the next day issued Notice of Violation No. 79–II–5–21 to Wilson Farms. Wilson Farms sought review of the notice and Judge Torbett held a hearing on Oct. 12, and Nov. 19, 1979. Following issuance of the decision on Feb. 8, 1980, Wilson Farms appealed to the Board.

Ted Q. Wilson and his wife own the land where the alleged violations occurred (Oct. Tr. 48).[3] Kentucky State Permit No. 2333–72 was issued to "Wilson Farms Coal Company" on Dec. 12, 1972. The permit covered 24 acres. In June 1973 a supplemental permit (No. 2333–72S#1) added 100 acres to the Wilson Farms permit (Exh. R–5). Subsequently, a renewed permit (No. 2333–72R) was issued to "Wilson Farms Coal" covering 90 acres of Permit Nos. 2333–72 and 2333–72S#1 (Exh. R–10 and R–11).

On June 3, 1977, Ted Q. Wilson and his wife leased certain properties to Kitov Corp. (Exh. R–6) which assigned the lease to Shannon Coal Corp. on Nov. 30, 1977 (Exh. R–7). Ted Q. Wilson testified that the land in question was covered by this lease (Oct. Tr. 48).

When the surface mining law went into effect, Kentucky computerized its records and assigned new numbers to existing permits (Nov. Tr. 19). Permit No. 2333–72S#1 apparently became Permit No. 274–0011 (Exh. R–133). By letter dated May 23, 1979, the Kentucky Department of Natural Resources and Environmental Protection (DNREP) informed "Wilson Farms Coal Company, c/o Ted Wilson" that it was enclosing a settlement order for signature and payment of a $2,000 civil penalty with respect to Permit No. "274–0011 (2333–72S#1)" (Exh. R–14). The settlement and penalty related to a "Noncompliance" dated Feb. 13, 1979 (Exh. R–7–1). By letter dated July 17, 1979, Ted Q. Wilson forwarded the signed settlement agreement and a $2,000 check to the Commonwealth. The Kentucky violation and the OSM violations involved the same area (Oct. Tr. 9, 59).

Discussion

Appellant does not contest the fact of the violations. It seeks rather to avoid responsibility under

(Continued)
sions in order to achieve approximate original contour in violation of 30 CFR 715.14.

Violation No. 2—Spoil, waste materials, and debris have been placed or allowed to remain on the downslope in violation of 30 CFR 716.2(a).

Violation No. 3—Failure to segregate and stockpile topsoil adequately in violation of 30 CFR 715.16.

[2] Act of Aug. 3, 1977, 91 Stat. 445, 30 U.S.C. §§ 1201–1328 (Supp. I 1977).

[3] Oct. Tr. refers to the Oct. 12, 1979, hearing transcript and Nov. Tr. to the Nov. 19, 1979, hearing transcript.

the Act. Ted Q. Wilson argues that he is not affiliated with Wilson Farms Coal, Wilson Farms Coal Co. or Wilson Farms Coal Co., Inc. However, the evidence amply supports the Administrative Law Judge's finding that Wilson Farms, Wilson Farms Coal, Wilson Farms Coal Co., and Wilson Farms Coal Co., Inc., were the same legal entity (a partnership of Ted Q. Wilson and his wife) from Dec. 12, 1972, to Oct. 11, 1979. We see no reason to disturb that finding.

Appellant's principal argument on appeal is that it is not responsible for the violations because the land in question was leased to Kitov Corp. Appellant states that under the lease the lessee agreed to assume all obligations and responsibilities of the lessors, including compliance with all present and future state and Federal laws. Appellant reasons that the lease relieved it from liability under the Act.

[1] OSM issued the notice of violation to Wilson Farms pursuant to § 521(a)(3) of the Act.[4] That section provides for the issuance of notices of violation to permittees. Therefore, a permittee is a proper party to be issued a notice of violation. In this case the permittee was at all times Wilson Farms. Wilson Farms never assigned a permit; Ted Q. Wilson and his wife merely entered into a lease. Whatever relief may be available to Ted Q. Wilson as a result of the arrangement, Wilson Farms cannot be relieved of its obligations as a permittee under the Act by virtue of the lease to Kitov Corp.[5]

In addition, at the same time that the lease was in effect, Ted Q. Wilson entered into a settlement agreement and paid a $2,000 civil penalty to the Commonwealth of Kentucky for violations of the Kentucky surface mining law on the same lands. This action was clearly contradictory to the assertion that Wilson Farms had transferred its obligations to the lessee under the lease.

Wilson Farms also argues that it was in an untenable position because of conflicting directions from Kentucky and OSM officials. Ted Q. Wilson testified that Kentucky instructed him on May 15, 1979, not to take "any action on this permit"

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[4] Sec. 521(a)(3) (30 U.S.C. § 1271(a)(3) (Supp. I 1977)) reads in pertinent part:

"When, on the basis of a Federal inspection which is carried out * * * pursuant to section 502, * * * the Secretary or his authorized representative determines that any *permittee* is in violation of any requirement of this Act * * * the Secretary or authorized representative shall issue a notice to the *permittee or his agent* fixing a reasonable time * * * for the abatement of the violation." (Italics added.)

[5] In response to comments received by OSM concerning the assignment of points for negligence in the assessment of civil penalities during the interim program, the following explanation was made in the preamble to the interim program regulations:

"Comments were received suggesting that the attribution to the permittee of the actions of all persons working on the mine site was improper. They were rejected. The Act, and indeed State laws, makes the permittee liable for the conduct of the mining and compliance with the law. Anyone working on the mine is there for the benefit of or at the sufferance of the permittee. To excuse the permittee from violations resulting from activity of such people would undermine the permittee's motivation to exercise his control to protect against violations." 42 FR 62671 (Dec. 13, 1977).

until it approved a proposed silt control plan (Oct. Tr. 53; Exh. R–7–1). The plan was not approved until Aug. 17, 1979 (Oct. Tr. 53). During the intervening period, OSM issued the notice of violation on June 20, 1979. The apparent thrust of this argument is that the notice should not have been issued because nothing could be done to correct the violations. However, Ted Q. Wilson's letter to the Kentucky DNREP dated July 17, 1979, indicates that reclamation work was being undertaken on this area and, therefore, clearly "any action" on the permit was not forbidden.

Appellant's other arguments have been considered, and we find them to be without merit.[6]

The decision appealed from is affirmed.

WILL A. IRWIN
Chief Administrative Judge

NEWTON FRISHBERG
Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

UNITED STATES v. CATLIN BOHME ET AL.
UNITED STATES v. EXXON CORP. ET AL.
UNITED STATES v. AIDABELLE BROWN ET AL.

48 IBLA 267

Decided *June 30, 1980*

Cross appeals of Administrative Law Judge Harvey C. Sweitzer's decision dismissing a Government contest to various oil shale placer mining claims and declaring others null and void. Colorado Contest Nos. 658, 659 and 660. On remand from the United States District Court for the District of Colorado.

Affirmed in part, reversed in part.

1. Administrative Procedure: Burden of Proof—Contests and Protests: Gen-

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[6] Appellant argues further that the notice should be vacated because the Secretary of the Interior failed to notify the State regulatory authority as required by sec. 521(a)(1) of the Act (30 U.S.C. § 1271(a)(1) (Supp. I 1977)). As we stated in *Dayton Mining Co., Inc., & Plateau, Inc.*, 1 IBSMA 125, 86 I.D. 241 (1979), the Secretary has interpreted the Act through the interim regulations to exclude sec. 521(a)(1) from having effect during the interim regulatory program. The same conclusion was reached in *Union Carbide Corp. v. Andrus*, 9 ELR 20701 (S.D.W.Va. 1979).

Appellant directs our attention to *Virginia Surface Mining & Reclamation Ass'n, Inc. v. Andrus*, 483 F. Supp. 425 (W.D.Va. 1980), and asserts that the permanent injunction in that case should foreclose OSM enforcement in this case. But this case arose in Kentucky, not Virginia, and in any event the Virginia injunction has been stayed by the U.S. Supreme Court. *Andrus v. Virginia Surface Mining & Reclamation Ass'n*, 48 U.S.L.W. 3601 (Mar. 18, 1980).

Appellant claims that the Act does not apply to its activities because it was affecting 2 acres or less and sec. 528(2) (30 U.S.C. § 1278(2) (Supp. I 1977)) exempts such activity from coverage by the Act. This assertion is not supported by the record, however. The OSM inspector testified that more than 2 acres had been disturbed (Oct. Tr. 14), and specifically indicated that more than 2 acres had been disturbed after May 3, 1978 (Oct.

(Continued)

(Continued)

Tr. 45). Appellant made no attempt to rebut this testimony.

The last argument made by appellant is that the OSM enforcement action constituted "double jeopardy" in that appellant had paid a $2,000 civil penalty as a result of Kentucky enforcement action on the same surface coal mining operation. The double jeopardy clause only applies in the criminal context; such a prohibition is not applicable to a civil action. *See Breed v. Jones*, 421 U.S. 519, 528 (1975). Furthermore, the violations cited by the Commonwealth of Kentucky were totally unrelated to those contained in the OSM notice (Exh. R–7–1; Exh. R–3).

erally—Evidence: Prima Facie Case—Mining Claims: Contests—Rules of Practice: Appeals: Burden of Proof—Rules of Practice: Government Contests

The assertion that annual assessment work has not been performed is the assertion of a negative fact. If an examination of the mining claims and the nearby lands does not reveal the accomplishment of the required work, and there is no record of any such work having been performed, then evidence to this effect would be sufficient to establish a prima facie case. It would then devolve upon the claimant to show by a preponderance of countervailing evidence that he has substantially complied with the statute.

2. Administrative Procedure: Burden of Proof—Contests and Protests: Generally—Evidence: Burden of Proof—Mining Claims: Contests—Mining Claims: Determination of Validity—Rules of Practice: Appeals: Burden of Proof—Rules of Practice: Government Contests

In a Government contest proceeding to determine the validity of a mining claim, the claimant is always the proponent of the rule or order, always the one claiming to have earned the benefit of the mining laws through his compliance therewith. Regardless of whether the issue on which the validity of the claim rests is discovery, mode of location, or performance of assessment work, the relative position and obligation of the contestant and the contestee remain the same.

3. Administrative Procedure: Adjudication—Contests and Protests: Generally—Mining Claims: Assessment Work — Mining Claims: Contests—Mining Claims: Determination of Validity—Rules of Practice: Government Contests

Where the Government contests the validity of a mining claim for nonperformance of annual assessment work, there is nothing inherent or implied in that action which requires a conclusion that the claim is valid in all other respects, nor may the bringing of such an action be treated as tantamount to an admission by the Government that "property rights in the claim have been established by the making of a valid location."

4. Mineral Leasing Act: Generally—Mining Claims: Abandonment—Mining Claims: Assessment Work—Stare Decisis

Failure to maintain a claim by doing assessment work each year may constitute evidence of abandonment. Independently, a failure to substantially comply with the requirement that annual assessment work be performed, 30 U.S.C. § 28 (1976), requires a finding that the claim has not been "maintained" within the meaning of sec. 37 of the Mineral Leasing Act, 30 U.S.C. § 193 (1976), and may result in a forfeiture of the claim. *Hickel* v. *The Oil Shale Corp.*, 400 U.S. 48 (1970).

5. Equitable Adjudication: Generally—Estoppel

No decision of any Federal court, or any formal decision or Instruction issued by the Department of the Interior has ever purported to hold that a mining claimant is not required under 30 U.S.C. § 28 (1976) to perform annual assessment work. Relevant court decisions deal not with the question whether oil shale claimants are required to comply with the provisions of sec. 28, but whether the United States is a beneficiary of a failure to perform the assessment work, and such decisions expressly note that a mining claimant is required to perform labor of $100 annually for each claim.

6. Equitable Adjudication: Generally—Laches

The defense of laches is not available against the Government in cases involv-

ing public lands. Even were laches determined to be an available defense, it would clearly be circumscribed by the same limitations surrounding the doctrine of estoppel.

APPEARANCES: David G. Manter, Esq., Denver, Colorado, Neil S. Mincer, Esq., Glenwood Springs, Colorado, for appellants in Contest No. 658; Warren O. Martin Esq., Denver, Colorado, for appellants in Contest No. 659; H. Michael Spence, Esq., Denver, Colorado, Fowler Hamilton, Esq., and Richard W. Hulbert, Esq., New York, N.Y., and Donald L. Morgan, Esq., Washington, D.C., for appellants in Contest No. 660. Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

INTERIOR BOARD OF LAND APPEALS

The above-captioned cases are before the Interior Board of Land Appeals on cross-appeals of the decision of Administrative Law Judge Harvey C. Sweitzer, dated July 17, 1979, dismissing contests against various oil shale placer mining claims and declaring others null and void for failure to substantially comply with the requirement that annual assessment work in the amount of $100 be performed for the benefit of each claim, 30 U.S.C. § 28 (1976).

Because of the lengthy history of these cases in the Department and in the courts, we will depart somewhat from the usual practice of setting forth the events immediately culminating in the decision from which the appeals are prosecuted. After identifying the parties and other preliminary matters, therefore, we shall reach and review Judge Sweitzer's decision as the chronology of these cases dictates.

I. INTRODUCTION

CONTEST 658—Mineral Patent Application C–028751

Contestees are: Cameron Catlin Bohme; St. Clair Napier Catlin; John R. Farnum, Jr.; Elizabeth Young Farnum Hinds; James M. Larson; Jean M. Larson; Rachael Magnall; Neil S. Mincer; Barnette T. Napier; Barnette T. Napier, Jr.; Grace A. Savage; Joan L. Savage; and John W. Savage. Contestees hold possessory title to the Northwest, Northeast, Southwest, and Southeast oil shale placer mining claims, all originally located on July 2, 1918. Those claims are collectively referred to as the Compass Group, an appellation we will also use. The claims are situated in sec. 27, T. 7 S., R. 98 W., sixth principal meridian, Garfield County, Colorado.[1]

On June 1, 1959, contestees or their predecessors in interest filed patent application for the Compass Group. Final certificate issued on Aug. 16, 1961.

[1] The Compass claims are situated in W ½ E ½ NE ¼, W ½ NE ¼, N ½ NW ¼, SW ¼ NW ¼, NW ¼ SW ¼, S ½ SW ¼, SE ¼.

CONTEST 659—Mineral Patent Application C–030979

Contestees are Exxon Corp. (Exxon), a New Jersey corporation; Joseph B. Umpleby; Wasatch Development Co. (Wasatch), a Colorado corporation; and Dixie Wittstruck as trustee under the will of R. E. Magor, Jr., deceased. Contestees hold possessory title to the Elizabeth Nos. 1, 2, and 4 through 12, located on May 18, 1918, and the Carbon Nos. 1 through 4, located on Apr. 10, 1918. These claims are situated in N ¼ sec. 32, secs. 33 through 36, T. 4 S., R. 97 W., sixth principal meridian, Garfield County, Colorado.[2]

On Sept. 8, 1959, contestees or or their predecessors in interest applied for patent of the subject claims with the exception of Elizabeth No. 3. No final certificate has been issued.

CONTEST 660—Mineral Patent Application C–012327

Contestees are: Aidabelle Brown, individually and as personal representatives of the Estate of Harry Donald Brown; Penelope Chase Brown Ulrey, individually and as trustee for the Estate of Harry and Penelope Chase Brown; and The Oil Shale Corp. (TOSCO), a Nevada corporation, as lessee. Pacific Oil of California (Pacific) appears as a named contestee. In 1964, however, Pacific Oil reconveyed title to contestees or their predecessors in interest. It therefore appears that Pacific Oil is no longer a proper party to this litigation; it is at best a nominal party.

Contestees hold possessory title to the Oyler Nos. 1 through 4 oil shale claims, originally located on Sept. 25, 1916. These claims are situated in secs. 10, 11, 12, T. 6 S., R. 95 W., sixth principal meridian, Garfield County, Colorado,[3] within the exterior boundaries of the Naval Oil Shale Reserve No. 1,[4] Colorado No. 1.

In September 1955, application for patent was filed by Pacific Oil of California, then possessory owner of the Oyler claims. Final certificate issued on Aug. 28, 1956.

All of the mining claims involved in these three contests were, by decisions of various dates in 1931, declared null and void on the ground, *inter alia*, of failure to comply with the assessment work requirements of the general mining laws, specifically 30 U.S.C. § 28 (1976). The import and general effect of these decisions and subsequent Departmental actions relating to these claims will be delineated *infra*.

For the purposes of clarity and convenience, we shall refer to the several groups of contestees by contest number, or by the first name leading those of the other contestees in the caption of each appeal.

[2] Specifically, the Elizabeth and Carbon claims are situated in N ½ N ½ sec. 32, and secs. 33 through 36 in their entirety. Portions of the surface and mineral estates have been patented and are not here involved.

[3] The Oyler claims are situated in sec. 10, lots 1 and 4, E ½ NE ¼ (NE ¼); sec. 11, N ½, N ½ SW ¼; and sec. 12, W ½ NW ¼.

[4] Created by Executive Order, dated Dec. 6, 1916.

Thus, unless otherwise indicated, references to Bohme, Exxon, or Brown, shall be understood to designate the entire group of contestees in each appeal.

It is also noted that our references to assessment years[5] will name the concluding year in which assessment work was due. Thus, reference to the year 1929, for example, denominates the assessment work year *ending* June 30, 1929.

II. HISTORY

Prior to 1920, oil shale was a locatable and patentable mineral under the Mining Law of 1872, May 10, 1872, 17 Stat. 91, 30 U.S.C. § 22 *et seq.* (1976). Sec. 28 thereof provides:

> On each claim located after the 10th of May 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year. On all claims located prior to the 10th day of May 1872, $10 worth of labor shall be performed or improvements made each year, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.

In 1899, the Secretary of the Interior held, in *P. Wolenberg*, 29 L.D. 302, 304 (1899):

> The annual expenditure of one hundred dollars, in labor or improvements, * * * is solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed to the courts and not to the land department [*citing Hughes* v. *Ochsner*, 27 L.D. 396 (1898), and *Opie* v. *Auburn Gold and Mining Co.*, 29 L.D. 230 (1899)].

Congress enacted the Mineral Lands Leasing Act (Leasing Act), Feb. 25, 1920, 41 Stat. 437, 30 U.S.C. § 181 *et seq.* (1976). That Act withdrew oil shale, among other minerals, from the operation of the mining law, and provided that thereafter these minerals were available for development by leasing only. The Act contains a savings clause, sec. 37, 41 Stat. 451, which provides, in material part, that: "[A]s to valid claims existent at the date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

Subsequent to the enactment of the Leasing Act, *supra*, the Secretary held in *Emil L. Krushnic*, 52 L.D. 282 (1927), *aff'd on rehearing*, 52 L.D. 295 (1928), that performance of annual assessment work on claims located for oil shale was a prerequisite to maintaining the claims in compliance with the laws under which they were initiated, as required by sec. 37 of the Leasing Act (commonly referred to as the "savings clause"). Thus, a failure

[5] Prior to 1958, the assessment work year commenced July 1 and ended June 30 of the following year. On Aug. 23, 1958, P.L. 85-736, 72 Stat. 829 (85th Cong. 2d Sess.), changed the commencement of the assessment year to Sept. 1.

to perform assessment work annually terminated a claimant's rights under the mining location. Under this interpretation, hundreds of oil shale claims were declared invalid for failure to comply with the assessment work requirements. Included among these claims were those which are involved in the instant appeals.

In *Wilbur* v. *United States ex rel. Krushnic* (*Krushnic*), 280 U.S. 306 (1930), the Supreme Court considered the effect and meaning of the savings clause with regard to the assessment work requirements of the Mining Law of 1872. Krushnic held possessory title to a claim on which he had defaulted in annual assessment work for the year immediately preceding his application for patent. Final certificate issued before the contest was instituted. The issue presented was whether the Leasing Act of 1920 extinguished the right under the general mining law to preserve a mining claim under the original location by resuming work after a failure to perform annual assessment labor.

The Supreme Court held that:

> While he is required to perform labor of the value of $100 annually, a failure to do so does not *ipso facto* forfeit the claim, but only renders it subject to loss by relocation. And the law is clear that no relocation can be made if work be resumed after default and before such relocation.
>
> Prior to the passage of the Leasing Act, annual performance of labor was not necessary to preserve the possessory right, * * * as against the United States, but only against subsequent relocators. So far as the government was concerned, failure to do assessment work for any year was without effect. Whenever $500 worth of labor in the aggregate had been performed, other requirements aside, the owner became entitled to a patent, even though in some years annual assessment labor had been omitted.
>
> * * * * *
>
> * * * [A]fter failure to do assessment work, the owner equally maintains his claim, within the meaning of the Leasing Act, by a resumption of work, unless at least some form of challenge on behalf of the United States to the valid existence of the claim has intervened. [Italics in original. Citations omitted.]

280 U.S. at 317–18.

On June 17, 1930, following the decision of the Supreme Court in *Krushnic*, *supra*, instructions for adverse proceedings against oil shale claims on the ground of default in assessment work were issued. In these Instructions, 53 I.D. 131, 132 (1930), Secretary Wilbur directed:

> [W]here, as in this case, patent proceedings have been instituted and the requisite expenditure has been made, the applicant has shown compliance with the law in maintaining the claim, no challenge can, at this late date, be made against the claimants because of failure to perform annual labor. Such challenge must be at a time when under the law adverse claimants could assert their rights.
>
> It is clear * * * that the United States, in order to make a lawful challenge to the validity of an oil shale claim for failure to do the annual assessment work in any patent proceedings, must do so at a time when there is an actual default and no resumption of work, and prior to the time the patent proceedings including the publication of notice have been completed.

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As a result, it was the Department's official position that it possessed authority to initiate contest proceedings for failure to perform annual assessment work, provided such challenge was instituted during actual default and prior to resumption of the work. Accordingly, the Department proceeded against oil shale claims in appropriate circumstances.

Five years later, *Ickes* v. *Virginia-Colorado Development Corp.* (*Virginia-Colorado*), 295 U.S. 639 (1935), was decided. In that case, the mining claimant had defaulted in assessment work in the year immediately preceding the initiation of the contest proceedings. The Department subsequently declared the claim null and void. The issue presented was whether the mining claimant had the right to retain possession of the claim, as against the United States, and resume work at any time before a valid relocation by another. No relocation could have occurred during the period of default.

The Supreme Court held that the mining claimant was squarely within the savings clause of the Leasing Act:

> Plaintiff had lost no rights by failure to do the annual assessment work; that failure gave the government no ground of forfeiture. [Citing *Krushnic, supra.*]
>
> * * * Plaintiff was entitled to resume [work]. * * * Plaintiff's rights after resumption would have been as if "no default had occurred." *Belk* v. *Meagher*, [104 U.S. 279 (1881)] * * *. "Such resumption does not *restore* a *lost* estate * * *; it *preserves* an *existing* estate." [Italics in original.]

295 U.S. at 646.

Thus, *Virginia-Colorado* rejected the Department's interpretation of *Krushnic*, that a default in assessment work subjected a mining claim to governmental challenge during the actual period of default and prior to subsequent resumption of assessment work. In the *Shale Oil Co.*, 55 I.D. 287 (1935), the First Assistant Secretary stated:

> In view of this opinion of the court, the adverse proceedings and decision of the Commissioner therein in the instant case must be held as without authority of law and void. The * * * decision * * * in the *Virginia-Colorado Development Corporation* [53 I.D. 666 (1932)] case and the instruction of June 17, 1930, are hereby recalled and vacated. The * * * decisions in the cases of *Francis D. Weaver* [53 I.D. 175 (1930)] and *Federal Oil Shale Company* [53 I.D. 213 (1930)] *and other Departmental decisions in conflict with this decision are hereby overruled.* [Italics supplied.]

55 I.D. at 290

In the nearly 30 years following *Virginia-Colorado* and the *Shale Oil Co.*, *supra*, the Department was of the official view that default in assessment work was exclusively a matter between rival claimants. That official view was widely disseminated among miners, members of the state and Federal legislatures, and governmental agencies, and the interested public. We believe the administrative record herein, amply supplemented by exhibits adduced by contestees during the trial in district court, admits of no other conclusion regarding the Department's official view that defaults in annual assessment work inured only to the

benefit of rival claimants. Many hundreds of oil shale claims had been declared null and void during the 1920's and 1930's on the principal ground of default in performance of annual assessment work. After *Virginia-Colorado* and the *Shale Oil Co., supra*, many of these claims proceeded to patent notwithstanding those early decisions, the Department's view then being that such decisions were invalid for any purpose.

Contestees filed patent applications in 1955 (Contest 660) and 1959 (Contest 658 and 659). Bohme (Contest 658) and Brown (Contest 660) received final certificates. In 1961, however, the Department adopted the position that the pre-1935 administrative contest proceedings barred issuance of patent. Accordingly, contestees' patent applications were denied by decisions dated Feb. 16 and 23, 1962. Contestees appealed to the Director of the Bureau of Land Management, but the Secretary, in exercise of his supervisory jurisdiction, submitted the case to the Solicitor for final decision. That decision, *Union Oil Co. of California*,[6] 71 I.D. 169 (1964), affirmed the Manager's [7] decisions to reject the contestees' patent applications.

In *Union Oil*, the Solicitor recognized that:

> The basis of the Manager's decisions in the present cases was not that the original cancellations were correct as a matter of law at the time they were made, but rather, that "under * * * principles of finality of administrative action, estoppel by adjudication, and *res judicata* * * *," they cannot now be challenged. [Italics in original.]

71 I.D. at 170.

Citing the *Shale Oil Co., supra*, the Solicitor asserted that the language used therein "distinguishes those cases actually before the Secretary from those which are not. As to the former, the Commissioner's decisions canceling the claims were expressly *recalled* and *vacated*. The latter were merely 'overruled' [footnote omitted]." 71 I.D. at 175.

After noting the Department's longstanding practice of giving prospective application to its decisions, the Solicitor concluded that the *Shale Oil Co.* decision "merely recalled and vacated the earlier decision in that particular case '* * * thereby depriving the earlier opinion of all authority as precedent.'" *Id.* at 176. This view was based in large part on the fact that contestees (or their predecessors in interest), with the exception of Brown, failed to appeal the old contest decisions after notice and hearing. *Id.* at 172, n.5. In such circumstances, the Solicitor ruled the earlier decisions must be held conclusive, and "in the absence of a legal or equitable basis warranting reconsideration," such decisions would not be reopened. That the Supreme Court or a court of appeals should subsequently invalidate the legal basis for such decisions was held insuffi-

[6] Supplemental decision, *Union Oil Co. of California*, 72 I.D. 313 (1965).

[7] The duties at that time exercised by the Land Office Manager are now primarily located in the Office of the BLM State Director.

cient to require "reconsideration and reversal of cases finally decided before the change in the interpretation or application of the law" (citations omitted). *Id.* at 177.

In response to arguments advanced by contestees, the Solicitor also ruled that neither *Krushnic* nor *Virginia-Colorado*, *supra*, denied the Secretary's jurisdiction to challenge the claims in the 1930's; rather, those decisions had merely found error in his interpretation and application of the explicit terms of the statutes relating to the effect of failure to perform annual assessment work. The Solicitor expressly rejected the contention that the United States had consistently recognized the validity of the subject claims during the period 1955 through 1962.

As previously noted, *Union Oil Co.* affirmed the Manager's decisions to reject the patent applications for the instant claims. Contestees therein then sought review of the Solicitor's decision in the District Court for the District of Colorado. *The Oil Shale Corp.* v. *Udall*, 261 F. Supp. 954 (D. Colo. 1966). We think it advisable to set forth at length the issues there presented, as they have recurred throughout this litigation.

First, plaintiffs contended that *Krushnic* and *Virginia-Colorado*, *supra*, stand for the proposition that the Department lacked authority to declare oil shale claims null and void on the ground of failure to perform annual assessment work. Second, plaintiffs challenged the adequacy of notice of the pre-1933 contest proceedings. Third, referring to various pronouncements of the Department's officials and employees between 1935 and 1962, and the patenting of claims previously declared void in circumstances identical to those surrounding the subject claims, plaintiffs argued that such acts constituted a rule of law which could not be retroactively altered by the Department. Thus, they argued that the old contests had no effect on the validity of the claims. Plaintiffs further asserted that they and their predecessors in interest had justifiably relied upon this rule of law.

The *Union Oil* decision, *supra*, was premised upon the assumption, in the view of the district court,

> that the Supreme Court had not denied the Department's jurisdiction with respect to the subject matter. * * * In essence, [the Solicitor] determined that the applicants were required to take action to nullify these rulings at the time and that their failure to exercise this initiative constituted something in the nature of an implied acquiescence.

261 F. Supp. at 965.

The court further noted:

> In supporting of his holding that there was such jurisdiction, the Solicitor pointed to the language in *Virginia-Colorado* to the effect that the Secretary had authority by appropriate proceedings to determine that a claim was invalid for lack of discovery, fraud, or other defect, or that it was subject to cancellation by reason of abandonment. From this he concluded that the Department at all times retained jurisdiction; that is, power over these claims. As we view it, this was an unjustified interpretation of the decisions of the Supreme Court. It overlooked the basic nature in terms of

property of a mining location. Both *Krushnic* and *Virginia-Colorado* proceeded on a fundamental proposition that this creates a vested property right which can be defeated only by a competitor. Historically, this was the nature and character of the mining claim, and to overlook it is to change a fundamental rule of property.

* * * [A]n adjudication by a tribunal lacking subject matter jurisdiction is wholly nugatory, need not be appealed, and can not be *res judicata*. When, as here, the Department acted beyond the authority granted to it by the law, it acted in the particular area beyond its jurisdiction. * * * It is clear from a reading of * * * [*Virginia-Colorado*] that the Court was speaking on the question of the Department's jurisdiction. As to pre-1920 locations, the Court held that they retained the legal status which they had enjoyed prior to the adoption of the Leasing Act. * * * [*Krushnic* and *Virginia-Colorado*] rule that prior to the adoption of this Act the performance of assessment work was unnecessary to the preservation of the locator's possessory right against the Government.

Virginia-Colorado clarified beyond question the proposition that the Government has never had a possessory right to pre-Leasing Act mining claims defective only for failure to perform assessment work. It follows from this that the Department is wholly without jurisdiction to inquire into the status of assessment work performance.

261 F. Supp. at 965–66.

The Court of Appeals for the Tenth Circuit affirmed the district court's judgment of reversal. *Udall* v. *The Oil Shale Corp.*, 406 F.2d 759 (10th Cir. 1969).

The Supreme Court granted certiorari to consider whether *Krushnic* and *Virginia-Colorado* had been correctly construed and applied. In *Hickel* v. *The Oil Shale Corp.* (*TOSCO*), 400 U.S. 48 (1970), the Court while declining to overrule these cases, limited the holdings therein. Specifically, the Court held:

[D]icta to the contrary, we conclude that they must be confined to situations where there had been substantial compliance with the assessment work requirements of the 1872 Act, so that the "possessory title" of the claimant, granted by 30 U.S.C. § 26, will not be disturbed on flimsy or insubstantial grounds.

Unlike the claims in *Krushnic* and *Virginia-Colorado*, the Land Commissioner's findings indicate that the present claims had not substantially met the conditions of § 28 respecting assessment work. Therefore we cannot say that *Krushnic* and *Virginia-Colorado* control this litigation. We disagree with the dicta in these opinions that default in doing the assessment work inures only to the benefit of relocators, as we are of the view that § 37 of the 1920 Act makes the United States the beneficiary of all claims invalid for lack of assessment work or otherwise. It follows that the Department of the Interior had, and has, subject matter jurisdiction over contests involving the performance of assessment work.

400 U.S. at 57.

The Court expressly rejected the proposition that enforcement of the assessment work provision derived solely from relocations as relocation was impossible after 1920. The opposite conclusion would mean "that a claim could remain immune from challenge to anyone with or without any assessment work, in complete defiance of the 1872 Act."

400 U. S. at 56.

As to the argument that the *Shale Oil Co., supra*, constituted an administrative rule which nullified the 1930–33 contest proceedings which had held appellees' claims void, and as to the question whether those proceedings, if still valid, were currently reviewable for substantive and procedural errors, the court directed consideration on remand of "all issues relevant to the current validity of those contest proceedings * * * including the availability of judicial review." 400 U.S. at 58.

On remand, in *The Oil Shale Corp.* v. *Morton*, 370 F. Supp. 108 (D. Colo. 1973), the district court treated its task as two-fold: To decide whether the 1930–33 contests are valid and therefore a proper basis for the Manager's decisions to reject contestees' patent applications; and secondly, should the old contests be held nullities, whether the subject claims are presently valid, after all other possible grounds of invalidity have been considered. The issue of procedural defects in the old contest proceedings was reserved pending resolution of the foregoing issues.

In effect, the district court ruled that the Department's statements in the years from 1935 to 1961, in the form of Departmental memoranda, official correspondence and regulations, constituted a rule which "had the force and effect of law to the same extent as though written into the statute." (Citations omitted.) 370 F. Supp. at 122. The court characterized this "legislative rule" as a "procedural rule * * * binding on the Department and this Court under the holding of Service v. Dulles, 354 U.S. 363 (1957)," and concluded that contestees and the mining industry were therefore justified in believing assessment work involved possessory rights and was solely a matter of concern to rival claimants to mineral lands. The court also found that the old contests had been vacated by the *Shale Oil Co., supra*, and therefore constituted no obstacle to patent. Thus, no administrative appeal had been necessary in the view of the court to remove the impediment posed by the old contest decision. *Id.* at 123.

The court further held the Government estopped from denying patents based on the old contest decisions, on the basis of the following acts and statements:

> (1) The Secretary's 1935 holding in *Shale Oil, supra*, which, in response to the ruling in Ickes v. Virginia-Colorado Development Corp. [*supra*], specifically over-ruled all departmental decisions purporting to invalidate oil shale claims for failure of assessment work requirements; (2) the subsequent dismissal, adverse to the government, of contest proceedings pending against these and other oil shale claims; and (3) the systematic issuance of patents from 1935 to 1962 to other oil shale claim owners whose claims had purportedly been invalidated for assessment work failure prior to *Ickes* [v. *Virginia-Colorado Development Corp.*].

370 F. Supp. at 124.

As there had been no administrative hearing within the Department to consider other possible grounds

for the current invalidity of the claims, the district court remanded the subject cases to the Bureau of Land Management for further action.

As to the challenge of the processing of the patent applications on procedural grounds, the district court was of the opinion that regardless of the notice and hearing provided in the old proceedings, contestees were entitled to present evidence to the Manager on the issue of whether those voidances were themselves invalid.

After commenting on contestees' opportunity to adduce evidence and present argument at trial, and after noting that the parties did not request a remand to the Department, the court found as follows:

1. Whether the Department had repudiated the 1930–33 contests was a question of fact, or of mixed law and fact; rejection of the patent applications constituted a finding that there had been no repudiation of the voidances. The Solicitor's reliance on the notice and hearing provided in 1930–33 as reason for denying a current hearing was erroneous, as contestees sought a hearing on the Department's conduct since 1935. Contestees were therefore entitled to an evidentiary hearing in accordance with the rule of *United States* v. *O'Leary*, 63 I.D. 341 (1956).

2. The court noted without comment contestees' charge that the Solicitor had been impermissibly involved with both the recommendation to reject the patent applications and administrative appellate review of the decisions to do so. The court observed that regulations promulgated in 1972 (now) prevent similar occurrences.

On Sept. 22, 1975, the Tenth Circuit Court of Appeals vacated the decision of the district court. The court perceived the substantive grounds relied upon by the district court to be (1) the vacating effect of the *Shale Oil Co.* decision, *supra;* (2) the Department's "rule" of patenting oil shale claims previously declared void for failure to do assessment work; and (3) estoppel. In the court's view, only grounds (1) and (2) related directly to the Supreme Court's order of remand; ground (3) was deemed an issue relevant to the current validity of the old contests.

The Court of Appeals noted that the district court's holding that the old assessment contests could not furnish a present basis for barring patents to these contestees necessarily encompassed, however, other issue—abandonment, inadequate assessment work, fraud, "and the like"—not previously adjudicated in any administrative proceeding. The Tenth Circuit observed that the issue of the current effect of the previous contests, and whether current judicial review for substantive and procedural errors is possible at this time, would remain to be considered should the district court's decision at 370 F. Supp. 108 be invalidated upon further appellate review.

Thus, in remanding to the district court,[8] The Tenth Circuit directed:

1. Where appropriate, contestees should apply for patent.[9] In those instances where contestees had applied for patent (Bohme, Brown and Exxon), the cases should be remanded to the Department for reconsideration and reprocessing. In either event the Department was directed to assert and consider any and all bases for the invalidity of these claims.

2. On the issue of estoppel, the Department was further directed to receive all competent evidence upon the question of individual reliance upon the actions of Interior during the years 1935–62 regarding the legal effect of the early assessment work contests.

3. After the conclusion of the administrative proceedings, the district court would try the issue of alleged substantive or procedural deficiencies in the old contests, and rule upon the propriety of judicial review at the present time, including taking of additional evidence if necessary. The court required the district court to "supplement its present findings of fact and conclusions of law as needed to dispose of the new matters presented." Order of Remand, Sept. 22, 1975, p. 7. It is noted, however, that the Department was granted an opportunity, in the course of these remand proceedings, to correct any existing procedural errors.

4. In the event the Department asserted no additional bases of invalidity—that is, in addition to old assessment work contests—the parties were invited to enter into a stipulation to that effect, thus eliminating all but the question of the availability at this time of judicial review of the old contests.

By order dated Jan. 17, 1977, the district court remanded these cases for further administrative proceedings. The order of remand directed the Department in material part to:

> (a) consider and rule upon all possible obstacles to the patenting of these claims;
>
> * * * * *
>
> (c) receive all competent evidence on the issue of estoppel, which concerns the question of individual reliance by claimants upon the prior actions of the Department of Interior regarding the effect of the assessment work contests; and
>
> (d) correct any existing procedural errors [10] made in prior proceedings.

[8] The mandate was recalled by the court on Mar. 1, 1976, and stayed through Apr. 11, 1976, pending the outcome of contestees' petition for writ of certiorari. That petition was denied in June 1976. The district court in turn stayed its order of remand to the Department until it had entered its judgment in *Shell Oil Co.* v. *Kleppe*, 426 F. Supp. 894 (D. Colo. 1977), *aff'd* 591 F. 2d 597 (10th Cir. 1979). The Supreme Court upheld the decision of the court of appeals. *Andrus* v. *Shell Oil Co.*, 48 U.S.L.W. 4603 (June 3, 1980); *see* n. 12, *infra*.

[9] That part of the order pertains to *The Oil Shale Corp.* v. *Kleppe*, No. 74–1344, No. C–8680 in the district court, the only case in which the claimants had not filed patent applications. The district court retained jurisdiction over No. C–8680 pending our decision herein. In the event claimants in that case elect to seek patent, the case will be remanded to the Department. Order of Remand, Jan. 17, 1977 (D. Colo.), p. 2.

[10] As noted in *Hickel* v. *The Oil Shale Corp.*, *supra*, the Secretary held in *Union Oil Co.*, *supra*, that the 1930–33 contest proceedings are subject to reopening as to any locator for whom receipt of service is not adequately shown.

In addition, the Department was directed to consider the implications of the decision by the Tenth Circuit in *Shell Oil Co.* v. *Kleppe*, No. 74–F–739 (D. Colo. Jan. 17, 1977),[11] "wherever relevant to the issues raised at those proceedings."

To conform to the Supreme Court's direction that the Department assert any and all bases for barring contestees' patent applications, the Colorado State Office, Bureau of Land Management (BLM), instituted contest proceedings against these claims in May 1977. The contest complaints charged as to each group of claims (1) lack of discovery of a valuable mineral deposit or, alternatively, that no such discovery presently exists[12]; and (2) that the claims were previously declared invalid in 1930–33, on the ground of failure to perform annual assessment work as required by law. In Contest 659 (Carbon-Elizabeth claims), the United States also charged that these claims were not physically located on the ground prior to the enactment of the Leasing Act, *supra;* that the claims are abandoned; and with respect to one claim, that a defect in title exists. In Contest 658 (Compass Group), the Government additionally charged that the lands embraced by the claims are nonmineral in character and thus not patentable.

Following a prehearing conference with Judge Sweitzer, all counsel agreed that the charge that "annual assessment work has not been performed on these claims as required by law" is the only issue ripe for determination by these administrative proceedings.

In each case contestees generally deny the charges and contend that the contests are barred by estoppel and laches.

On July 18, 1978, a hearing before Administrative Law Judge Harvey C. Sweitzer was conducted. On July 17, 1979, Judge Sweitzer issued his decision dismissing the charge that annual assessment work had not been performed as required by law as to the Compass group (Northwest, Northeast, Southwest and Southeast) and the Oyler group (Nos. 1–4), and sustained as to the Carbon group (Nos. 1–5) and the Elizabeth group (Nos. 1, 2, 4–12, inclusive). Accordingly, the latter placer mining claims were held invalid. These cross-appeals followed. The parties completed their posthearing briefing in January 1980.

[11] *See* n. 12, *infra.*

[12] As to this point, on June 2, 1980, the Supreme Court rendered its decision in *Andrus* v. *Shell Oil Co.*, 48 U.S.L.W. 4603 (June 3, 1980). The syllabus of that case recites:

"*Held*: The oil shale deposits in question are 'valuable mineral deposits' patentable under the [Mineral Leasing] Act's saving clause. The Act's history and the developments subsequent to its passage indicate that the Government should not be permitted to invalidate pre-1920 oil shale claims by imposing a present marketability requirement on such claims. The Department's original position, as set forth in Instructions, issued shortly after the Act became law, authorizing the General Land Office to begin adjudicating applications for patents for pre-1920 oil shale claims, and later enunciated in *Freeman* v. *Summers*, [52 L.D. 201 (1927)] is the correct view of the Act as it applies to the patentability of pre-1920 oil shale claims."

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III. THE DECISION AND ARGUMENTS ON APPEAL

Preliminarily, we will set forth (a) Judge Sweitzer's understanding of counsel's stipulations as presented at the prehearing conference and at the hearing; (b) his procedural rulings and definitions or clarifications (Dec., pp. 4–19).

The Stipulations

Judge Sweitzer's Prehearing Conference Order No. 1 contained the following paragraphs based upon counsel's stipulations:

> 4. In consideration of the decision of the United States District Court for the District of Colorado in *Shell Oil Co. v. Kleppe*, No. 74–F–739 (January 17, 1977), and with a view to expediting the decision of other issues, trial of issues as to discovery of minerals will be deferred pending final decision of the appeal in *Shell Oil Co.* now awaiting argument in the Court of Appeals.
>
> * * * * *
>
> 7. The parties fully reserve their respective contentions heretofore advanced with respect to the effect, if any, of prior administrative decisions in assessment work Contests Nos. 12029, 12039 and 12972.
>
> 8. The parties contemplate presenting evidence, by stipulation if possible, as to the surface characteristics of the claims in contest and the mineralization at depth.

Regarding paragraph 7, *supra*, it appears that Judge Sweitzer was of the opinion that, except as to the issue of individual reliance and any supplements to the record on that point, the question of the present effect of the 1930–33 contests had been extensively litigated in the courts and, therefore, in accordance with the Orders of Remand, *supra*, was not to be relitigated in the administrative hearing. Comments of counsel at the prehearing conference, pp. 10–11, are set forth in his decision (Dec., pp. 7–8).

Procedural Rulings

In edited form, we repeat Judge Sweitzer's rulings:

1. The only issue ripe for consideration at the hearing was whether annual assessment work had been performed on the claims as required by law. Judge Sweitzer supported this conclusion with citations to Contestant's Opening Brief, p. 1; Contestees' Opening Posthearing Brief, p. 3; and Contestees' Supplement to Their Opening Posthearing Brief in Contest 658, p. 1 (Dec., p. 10).

2. The Judge referred to his findings in Addenda A and B, relating to the question of reliance by the claimants upon the prior actions of the Department concerning the old assessment contests (Addendum A), and relating to the question of reliance by the claimants upon prior actions of the Department relating to the need to continue to perform annual assessment work (Addendum B).

3. Judge Sweitzer determined that all other possible obstacles—abandonment, fraud, lack of physical location on the ground (Contest 659), and defective title—had been waived by contestant as neither deferred, reserved, nor at issue; he therefore dismissed all charges except that pertaining to assessment

work. The Judge also asserted that the Government had failed to present a prima facie case of such other charges.

4. Regarding the Department's opportunity to correct any existing procedural errors, the Judge understood this directive to refer to the pre-1972 combination of advocacy and appellate functions. Judge Sweitzer noted that contestees had neither raised nor argued alleged procedural error, and concluded that contestees had been afforded a fair hearing within the meaning of the Administrative Procedure Act, 5 U.S.C. § 556 (1976), which had corrected any procedural errors.

5. Judge Sweitzer held that, unlike other Government contests to determine the validity of mining claims, where the charge is nonperformance of assessment work it is similar to a charge of abandonment and implies tacit admission by the Government that the claim is valid in all other respects, thereby making the United States "the proponent of the rule or order," and imposing upon the Government the ultimate burden of proof.

6. Judge Sweitzer determined that a further hearing on the issues dismissed by his decision should not be ordered. As grounds therefor, the Judge cited (a) contestant's opportunity to argue and fully litigate the issues dismissed; (b) the additional time and expense to which contestees would be put by a contrary ruling; (c) that the justification for not ordering a hearing in the instant matter was as compelling as those set forth in *United States* v. *Bowen*, 38 IBLA 390 (1979), in which the refusal of an Administrative Law Judge to order a further hearing was affirmed; and (d) the possible objection of the district court or the court of appeals to any further delay.

7. All arguments or proposed findings and conclusions inconsistent with the decision were rejected as unsupported by the evidence or immaterial.

8. Concerning the contestees' argument that the remand orders did not contemplate requiring an appeal to the Interior Board of Land Appeals, Judge Sweitzer adverted to a letter, dated Feb. 6, 1980, from the Under Secretary to counsel of certain contestees, denying the petition requesting an order that the hearing decision constitute the final decision of the Department.

Judge Sweitzer also noted that for purposes of clarification, all references to an assessment year would utilize the concluding year in which assessment work was due. *See* n. 5, *supra*. Thus, the year 1929 denominates the assessment year commencing July 1, 1928, and ending June 30, 1929.

It is our intention to separately summarize the evidence for each of Judge Sweitzer's rulings, and the contentions of the parties with respect thereto. The decision held that claimants in Contests 658 (Bohme) and 660 (Brown) had substantially complied with the assessment work requirements of the mining law, 30 U.S.C. § 28 (1976). A contrary find-

ing was entered as to Contest 659 (Exxon). The decision also found, with respect to Bohme and Brown, that the claimants had relied upon the acts and statements of the Department from 1930 to 1962 both as to the effect of the old assessment contests (Addendum A) and the need to perform the annual assessment work (Addendum B).

Contestees appeal the adverse ruling as to Contest 659 and urge affirmance of all rulings favorable to them. The Government similarly appeals the findings as to Contests 658 and 660 and certain other rulings. Specifically, the parties argue five principal issues:

1. Whether the Government was correctly required to bear the burden of proving the contest charges against these oil shale claims.

2. Whether contestees have performed annual assessment work as required by law and thereby maintained their claims. Three subissues are presented: What is required by the statute; whether 30 U.S.C. § 28 (1976) governing assessment work is to be read *in pari materia* with 30 U.S.C. § 29 (1976) governing the prerequisites for a patent application; and what is the import of *Hickel* v. *TOSCO*, *supra*, as it concerns these two questions. Contestees specifically contend that an assessment contest must be instituted during a period of default and prior to resumption of development work.

3. The Government challenges the weight and credibility accorded certain evidence (Opening Brief, pp. 41–50). Included in this issue is the question whether the Judge correctly interpreted certain evidentiary stipulations.

4. Whether the decision correctly concluded that claimants had justifiably relied upon the Department's acts and statements from 1930–62 regarding the effect of the old contests and the need to perform assessment work annually.

5. Whether Departmental regulations promulgated prior to Sept. 1, 1972, preclude assessment work contests.

The Burden of Proof

The decision held that: "A Government challenge to the validity of a mining claim alleging failure to perform annual assessment work implicitly acknowledges that a possessory title exists which it is asking be forfeited. * * * [I]n doing this, the Government becomes a proponent of a rule or order that such a forfeiture has occurred" (Dec., p. 18).

In support of this ruling, Judge Sweitzer cited General Land Office Circular No. 460, 44 L.D. 572 (1916), in which it is directed, in pertinent part, that the Government is to assume the burden of proving the charges in contests initiated upon report against claims to the public lands, unless otherwise ordered. For the reasons that follow, we need not consider further points urged in support thereof.

Upon this point, the decision is in error and must be reversed. In *United States* v. *O'Leary*, *supra*, it was determined that hearings re-

lating to the validity of mining claims held before the Department were subject to the provisions of the Administrative Procedure Act. That Act provides that "the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556 (d) (1976). In *Foster* v. *Seaton*, 271 F.2d 836 at 838 (D.C. Cir. 1959), the Court of Appeals upheld the Secretary's ruling that in a mining claim contest, the Government "bears only the burden of going forward with sufficient evidence to establish a prima facie case, and that the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid." That decision and its progeny remain valid precedents which may not be ignored. *See*, *e.g.*, *United States* v. *Zweifel*, 508 F.2d 1150, 1157 (10th Cir. 1975), *cert. denied*, *sub nom. Roberts* v. *United States*, 423 U.S. 829 (1975), *rehearing denied*, 423 U.S. 1008 (1975); *United States* v. *Springer*, 491 F.2d 239, 242 (9th Cir.), *cert. denied*, 419 U.S. 834 (1974).

We think the error of Judge Sweitzer's ruling on this matter may be rooted in the unfortunate proclivity of the various authorities to suggest that substantial nonperformance of assessment work may equate with abandonment of the claim. As but one example, in *Hickel* v. *TOSCO*, *supra* at 57, the Court stated that defaults in performance of assessment work "*might be* the equivalent of abandonment." We see only a contingent, inconclusive connection.

In the absence of a statutory presumption that a default constitutes abandonment (*see* 43 U.S.C. § 1744 (1976)),[13] the fact of abandonment is determined on the basis of the intention of the party. Thus, a hypothetical mining claimant might have manifested a clear intention not to abandon his claims by each year posting thereon notices of intention to hold them, recording such notices, publishing them in a newspaper, forming a company for the development of his claims, etc., but performing no assessment work whatever. The weight of evidence in such a case would clearly militate against a finding on the basis of common law principles that the mining claimant had "abandoned" the claims. But would that absolve him of the consequences of his failure to meet his statutory obligation to perform assessment work each year for the benefit of each claim? Obviously not.

It is the mining claimant's duty under 30 U.S.C. § 28 (1976) to per-

[13] Sec. 314, Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), requires the recordation in the proper office of the Bureau of Land Management by the owner of unpatented lode or placer mining claims, or mill or tunnel site claims, of a copy of the official record of the location notice of the claim, and annually a notice of intention to hold the mining claim or an affidavit of assessment work. The section also provides that failure to file the required instruments within the designated time frame shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner. Further, nothing in the section shall be construed as a waiver of the assessment or other requirements of the mining law. *See also* 43 CFR Subpart 3833.

form work in the amount of $100 for the benefit of each claim annually, and that is an objective standard which he must meet regardless of other manifestations of his intent to retain the claims. A default, then, if it is to have any consequential effect, must result in *forfeiture*, not abandonment. Of course, where abandonment is charged, the nonperformance of assessment work would have evidentiary value in proving the charge. But why should we concern ourselves with the question of abandonment at all in such a case? It is purely a question of whether the claimant preserved his asserted possessory right to the claims by doing substantially what the statute requires in order to maintain the claims.

While we have noted above that there has been a certain confusion engendered by the occasional equating of the question of a forfeiture for failure to perform assessment work with the question of an abandonment, in the context of oil shale claims it is clear that the distinction has always been recognized. Thus, in *Virginia-Colorado*, *supra*, the Court found that the Department was without jurisdiction to inquire into the failure to perform assessment work. This holding would have been impossible if the Court perceived that the failure to perform the necessary work constituted a claim of abandonment since the Court had always recognized the authority of the Department to invalidate a mining claim upon a charge of abandonment properly proved. Thus, in *Virginia-Colorado*, 295 U.S. at 645–646, the Court expressly noted:

> There is no suggestion of lack of discovery, fraud or other defect. *There is no ground for a charge of abandonment. The allegations of the bill, admitted by the motion to dismiss, dispose of any such contention.* Plaintiff had lost no rights by failure to do the annual assessment work; that failure gave the government no ground for *forfeiture*. *Wilbur* v. *Krushnic, supra.* [Italics supplied.]

[1] Abandonment, being essentially a question of intent, is difficult of proof, and perhaps should impose a heavy evidentiary burden on the one who asserts it. But the assertion that annual assessment work has not been performed is the assertion of a negative fact. If an examination of the claims and the nearby lands does not reveal the accomplishment of the required work, and there is no record of any such work having been performed, then evidence to this effect would be sufficient to establish a prima facie case. It would then devolve on the claimant to show by a preponderance of countervailing evidence that he has substantially complied with the statute.

This is precisely what the Court of Appeals was addressing in *Foster* v. *Seaton*, *supra:*

> [The claimants,] and not the Government, are the true proponents of a rule or order; namely, a ruling that they have complied with the applicable mining laws. * * * Were the rule otherwise, anyone could enter upon the public domain and ultimately obtain title unless the Government undertook the affirmative burden of proving that no valuable deposit existed. *We do not think that Congress intended*

to place this burden on the Secretary. **[Italics supplied.]**

271 F.2d at 838.

[2] Although the court there was considering a case in which the Government had charged that no qualifying discovery of a valuable mineral deposit had been made, we are unable to draw a distinction between such cases and those now before us, insofar as the burden of proof is concerned. In a Government contest proceeding to determine the validity of a mining claim, the claimant is always the proponent of the rule or order, always the one claiming to have earned the benefit of the mining laws through his compliance therewith, always the one "seeking a gratuity from the Government." Regardless of whether the issue on which the validity of the claim rests is discovery, mode of location, or performance of assessment work, the relative position and obligation of the contestant and contestee remain the same.

Judge Sweitzer held that in a contest to determine the validity of a mining claim where the charge is nonperformance of assessment work, the burden of proof imposed on the Government is different—and greater—from where the contest is brought on a charge of no discovery of a valuable deposit of minerals. This is so, Judge Sweitzer found, because "performance of assessment work is a condition subsequent to maintain a mining claim after property rights in the claim have been established by the making of a valid mineral location. * * * In this respect, it is not dissimilar to abandonment * * *" (Dec., p. 16; citation omitted).

[3] The vice in this reasoning is dual. First, as we have already pointed out, nonperformance of assessment work bears very little similarity to abandonment. One might just as easily say that a lessee who fails to perform a continuing obligation under a lease had "abandoned" the leasehold. Second, where the Government contests the validity of a claim for nonperformance of annual work, there is nothing inherent or implied in that action which requires a conclusion that the claim is valid in all other respects, nor may the bringing of such an action be treated as tantamount to an admission by the Government that "property rights in the claim have been established by the making of a valid location."

In sum, Judge Sweitzer erred in holding that "the Government [in this case] becomes a proponent of a rule or order that such a forfeiture has occurred," and must, therefore, assume the ultimate burden of proof.

Annual Performance of Assessment Work

Judge Sweitzer construed the Supreme Court's decision in *Hickel* v. *TOSCO*, *supra*, as overruling, *sub silentio*, that portion of *Krushnic*, *supra*, which held that the Government must institute contest proceedings at a time when a rival claimant might challenge the

claim—that is, during the period of default and before resumption of work (Dec., pp. 26–7). Contestees contend, in essence, that the fact that the Court declined to expressly overrule the *Krushnic* and *Virginia-Colorado* cases precludes a contrary conclusion. Contestees also argue that the timeliness of a challenge for failure to do assessment work was not before the Court, and therefore the rule enunciated in *Krushnic* has retained its validity.

TOSCO clearly addressed the issue of whether *Krushnic* and *Virginia-Colorado* correctly held that failure to do assessment work furnishes no ground for forfeiture, but inures only to the benefit of relocators. The Supreme Court ruled that the United States is "the beneficiary of all claims invalid for lack of assessment work or otherwise. It follows that the Department of the Interior had, and has, subject matter jurisdiction over contests involving the performance of assessment work." 400 U.S. at 57.

In our view, contestees' argument regarding the timeliness of a Government challenge proves too much. The argument can be sustained only if the relevant discussion in *TOSCO* is ignored. In *TOSCO*, the Court noted that in *Virginia-Colorado* the lapse in assessment work had been held to provide no basis for a charge of abandonment. The decision in *TOSCO* continued:

> We construe that statement to mean that *on the facts of that case failure to do the assessment work was not sufficient to establish abandonment.* But it was well established that the *failure to do assessment work was evidence of abandonment. Union Oil Co. v. Smith*, 249 U.S. 337, 349; *Donnelly v. United States*, 228 U.S. 243, 267. If, in fact, a claim had been abandoned, then * * * [t]he United States had an interest in retrieving the lands. [Citations omitted.] The policy of leasing oil shale lands under the 1920 Act gave the United States a keen interest in recapturing those which had not been "maintained" within the meaning of § 37 of that Act. We agree with the Court in *Krushnic* and *Virginia-Colorado* that every default in assessment work does not cause the claim to be lost. *Defaults, however, might be the equivalent of abandonment;* and we now hold that *token assessment work, or assessment work that does not substantially satisfy the requirements of 30 U.S.C. § 28, is not adequate to "maintain" the claims.* [Italics supplied.]

400 U.S. at 56–7.

[4] We find the import of the language emphasized unambiguous: (1) failure to maintain a claim by doing assessment work each year may constitute evidence of abandonment; and (2) independently, a failure to substantially comply with the requirement that annual assessment work be performed (30 U.S.C. § 28 (1976)) requires a finding that the claim has not been "maintained" within the meaning of sec. 37 of the Leasing Act and results in a forfeiture of the claim.

Thus, in both *Krushnic* and *Virginia-Colorado*, the Supreme Court found that an abandonment could not be found by the mere fact of omission of one year's assessment work, particularly in the light of the claimants' subsequent actions. Similarly, the one year's deficiency in assessment work was held not to constitute a failure to "substan-

tially satisfy" the assessment requirements. Contestees, in contending that a Government challenge to a failure to perform assessment work must be initiated during the period of nonperformance, have confused the requirements for showing an abandonment, as explicated in *Krushnic* and *Virginia-Colorado*, with the requirements for establishing a forfeiture, as delineated in *TOSCO*.

Contestees also contend that the Departmental regulations in effect prior to Sept. 1, 1972, preclude a Government challenge premised on a failure to perform assessment work prior to that date. Such a contention finds little support in other cases considered by the Supreme Court. Thus, the Court stated in *Cameron* v. *United States*, 252 U.S. 450, 459–61 (1920):

> By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the land department, as a special tribunal; and the Secretary of the Interior, as the head of the department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. [Citations omitted.]
>
> A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims. But no right arises from an invalid claim of any kind. All must conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public.
>
> Of course, the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void. This is well illustrated in *Orchard* v. *Alexander*, 157 U.S. 372, 383.
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> * * * [T]o the same effect is *Michigan Land & Lumber Co.* v. *Rust*, 168 U.S. 589, 593, where in giving effect to a decision of the Secretary canceling a swamp land selection by the State of Michigan theretofore approved, but as yet unpatented, it was said: "It is, of course, not pretended that when an equitable title has passed the land department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. [Citations omitted.] In other words, the power of the department to inquire into the extent and validity of the rights claimed against the Government does not cease until the legal title has passed."

It is now beyond cavil that the Secretary of the Interior has subject matter jurisdiction to determine whether unpatented oil shale mining claims were maintained within the meaning of the savings clause in sec. 37 of the Leasing Act, including performance of adequate annual assessment work. *Hickel* v. *TOSCO*, *supra*.

Although the Department did not contest unpatented oil shale claims for failure to perform annual assessment work for many years following *Krushnic* and *Virigina-Colorado*, because of its misunder-

standing of its authority to do so, such earlier inaction does not make the present contests improper.

For the reasons discussed above, we affirm Judge Sweitzer's holding that a contest to determine whether a failure to substantially satisfy the requirements of 30 U.S.C. § 28 (1976), has resulted in a forfeiture of the claim is not barred by a resumption of assessment work.

Contestees also contend that these contests are barred by the performance, for each claim involved in these contests, of $500 worth of assessment work as a prerequisite for obtaining a patent, as required by 30 U.S.C. § 29 (1976).

An applicant for a patent must show, *inter alia*, that $500 worth of labor or improvements has been expended upon the claim by the claimant or his grantor. 30 U.S.C. § 29 (1976). Contestees argue that the Court in TOSCO did not consider or rule upon whether secs. 28 and 29 must be read *in pari materia*. In effect, contestees maintain that inasmuch as under sec. 29, a total expenditure of $500 is all that is needed to entitle a claimant for a patent, completion of expenditures in that amount constitutes "substantial satisfaction" of the requirements for annual expenditure found in sec. 28.

We agree with Judge Sweitzer that this contention is without support, either in the statutory scheme of the mining law, or the Departmental decisions holding that the purpose for doing assessment work under secs. 28 and 29 is the same. We recognize that both requirements are grounded in the same consideration: to encourage actual development of mineral lands. *United States* v. *Coleman*, 390 U.S. 599 (1968); *United States* v. *Iron Silver Mining Co.*, 128 U.S. 673 (1888). But this very purpose would not be served if contestees' argument was accepted. Under their argument it would be possible to expend $500 in the initial assessment year, and hold a claim for decades without any further expenditure. Surely, this is not what Congress had in mind in requiring annual expenditures on each claim. Rather, Congress enacted a scheme in which no claim could proceed to patent prior to the expenditure of $500 for development thereof. In the alternative, if a claimant chose not to go to patent, he was required to expend $100 in each year on the claim. It was the choice of the claimant who, upon expending $500 for the development of the claim, nevertheless decided not to apply for patent, which resulted in the requirement that the claimant annually expend $100 towards the claim's development. Until final certificate issues, a mineral claimant is obligated, under the provisions of sec. 28, to expend $100 annually. This is so whether such claimant has expended $500 or $5,000 on the claim. There is nothing inconsistent in the requirements of secs. 28 and 29. The decision of Judge Sweitzer is affirmed with regard to this issue.

Judge Sweitzer's decision holds that annual assessment work requirement of 30 U.S.C. § 28 (1976), is satisfied by "a reasonably per-

sistent effort to comply annually with the $100 assessment work requirement but that an occasional failure to literally comply will be excused" (Dec., p. 30). In addition, Judge Sweitzer found "that the data in evidence which were recorded or filed do not necessarily show all the work that was performed" (Dec., p. 31). The Judge also found that "the work that the evidence shows to have been done was performed in good faith, * * * tended to develop the claims, and to facilitate the eventual extraction of ore therefrom" (Dec., p. 32). It is correctly pointed out that the obligation to perform assessment work annually ceases following the issuance of final certificate. 43 CFR 3851.5.

According to Judge Sweitzer's tabulations, assessment work, statutory suspensions, or lieu notices appear for each of the following years for the Compass claims: 1919, 1920–30, 1931 for the Southwest claim only, 1932, 1949, and 1955 (Dec., p. 37). Contestees in No. 658 filed patent applications in June 1959; final certificate issued in August 1961. Thus the *record* evidence shows that out of 43 years, the requirements of 30 U.S.C. § 28 (1976) were satisfied in only 14 of those years and 15 years in the case of the Southwest claim only. A lengthy excerpt of the testimony of John W. Savage, a contestee in No. 658, is set forth as evidence of additional assessment work performed not of record.

Mr. Savage testified that at a time near the filing of the patent application, contestees took steps to be certain that $500 worth of work had been performed; that though "considerable amounts" of assessment work was done at that time, "no record was kept of this kind of thing because we believed that the only amount of labor and improvements necessary to get patent was a total of $5-hundred worth"; that contestees had secured aerial photographs of the "whole Coal Ridge"; that road work was done, though the witness did not know whether it benefited the claims or the surrounding patented land; and that contestee ceased filing affidavits of assessment work "a long time prior" to receipt of final certificate (Dec., pp. 37–41).

The Judge concluded that this showing of additional work was "in no way overcome by Contestant." Thus, contestant had not shown a failure to substantially comply with the labor requirements (Dec., p. 42). Accordingly, the charge of failure to do annual labor was dismissed as to the Compass claims.

Regarding the rulings pertaining to Contest No. 658, contestant here asserts that the Judge misunderstood certain stipulations. In that connection, the Government states that in each case the parties had stipulated that there was no assessment work of record other than that furnished by contestees in the abstracts of title filed in support of their patent applications. In Contest 658, the stipulated evidence

consists of three mineral reports and the mineral examiner's discussion of geology and assessment work (Opening Brief, p. 39).

Judge Sweitzer held that the Government's assertions that this testimony should be discounted were unpersuasive, noting that counsel for the Government had the opportunity to cross-examine Mr. Savage, to clarify his testimony, and to make appropriate argument regarding the stipulation or its intended purpose and effect, and had failed to so avail himself.

Judge Sweitzer found that contestees in Contest No. 659 satisfied assessment requirements in 1919 (lieu), 1920–26, 1932 (suspended), 1957, and 1958 (Dec., p. 44). Application for patent was filed in 1959; final certificate never issued. Because contestees' predecessors in interest ceased performing assessment work prior to the decision of *Krushnic*, *supra*, in 1930, he determined that contestees could not assert reliance on Departmental policy implementing that decision. The Carbon-Elizabeth claims were declared null and void for lack of substantial compliance with the provisions of 30 U.S.C. § 28 (1976).

As to the Oyler claims in Contest No. 660, the decision found substantial compliance demonstrated by the following: at least $400 worth of labor was done for the four claims as a group in 1917–19, 1921, 1923–25. In 1922, 1926, 1927, and 1928, the annual expenditure was less than $400 ($100 per claim) (Dec., pp. 45–46).

Specifically, no work was done on the Oyler No. 1 for the years 1924–26, and in 1922 the amount was less than the statutory $100 minimum. For the years 1922–25, no work was done in the Oyler No. 2 and in 1923 and 1926 the amount was less than $100. No work was done on the Oyler No. 3 in 1926 and 1928. No work was done on the Oyler No. 4 in 1926, and in 1922, 1923, and 1927, the work was less than the statutory minimum. Adequate work was done in 1930, no work in 1931, performance was suspended in 1932, and lieu or notices of intent were filed for 1933, 1935–38, and 1949. In 1939, the claimants filed a declaration of intent to "claim all benefits of a Supreme Court decision favoring such holding," Exh. P–346 ¶ 24, which was not filed pursuant to any statute. This data was gleaned, in part, from the 1929 and 1931 mineral examination reports of the General Land Office. The parties stipulated the admission of these reports, Exh. P–346. Finally, the decision contains the statement that affidavits asserting the performance of $100 of annual labor had been performed as *to each claim for 1924 and 1925*. In addition, it is noted that the parties stipulated that because of weathering and age, a current physical examination of the claims must be deemed unreliable to conclusively show the number or extent of all the improvements and work thereon (Dec., pp. 45–47).

From this, it was held that the Government had failed to show a default in substantially complying

with the assessment work requirements of the law. In so ruling, the Judge reasoned that the 1929 mineral report shows work continued on one or more of the claims for the years 1921–28, and from this concluded by implication that claimants "intended to, and did, accomplish the work to benefit each of the claims in the value of at least $100 per year, notwithstanding [the mineral examiner's] allocation of the work" (Dec., p. 47).

For the period of time from 1931 to Aug. 28, 1956, when final certificate issued for the Oyler claims, the Judge relied in part on an historical sketch prepared in 1952 by contestees' predecessors in interest, Exhs. P–334 and 335. It is conceded in the decision that this sketch is "very general" as to what work benefited the Oyler claims and as to when the work was done (Dec., p. 48). Contestant concedes that the 1929 mineral report shows that more labor was actually performed than that appearing of record, but characterizes such additional labor as "spotty." It is argued, however, that much of the labor was disallowed, omitted or inadequate (Opening Brief, p. 46).

Contestant also contends that the historical sketch referred to above provides no factual basis for these rulings, that it is incredible, and further, that the Judge failed to regard the document as a whole in concluding that the matters discussed therein refer to the Oyler claims. Specifically, the Government states that the Oyler claims are listed as the first oil shale claims acquired by the Index Oil Shale Company (Index), followed by the acquisition of the Mt. Blaine claims. It is argued that all the labor discussed in the rest of Exh. P–335 pertains to the Mt. Blaine claims, and that the narrative shows that no work was performed at all from 1932 to 1952. The final page of the historical sketch contains a statement to the effect that annual labor was done by and at the expense of Index.

In addition to the findings set forth, in each case the decision found that at least $500 worth of assessment work had been performed on or for the benefit of each of the claims, and that work had been resumed on each claim prior to the institution of contest proceedings.

Before we proceed to address specific contentions respecting the findings in each contest, we must consider Judge Sweitzer's formulation of the standard for determining whether a claimant has substantially complied with the annual assessment work requirements. As noted, the decision states that a reasonably persistent effort is contemplated by *TOSCO* and that occasional failures are excusable with the meaning of that decision.

We cannot agree with that formulation. It is clear beyond peradventure that *TOSCO* holds that in order to maintain a claim in compliance with the mining law of 1872,

$100 worth of assessment work must be done each year. 400 U.S. at 54.

In determining what constitutes substantial compliance with 30 U.S.C. § 28 (1976), resort to the facts of *Krushnic* and *Virginia-Colorado* is necessary. In each case the mining claimant had failed to perform assessment work in only a single year after the location of the claims; in the latter case, it was argued that resumption of work was prevented by actions of the Government. There was no question, as in these appeals, of whether claimants performed less than $100 of work in other assessment years. Moreover, in *TOSCO*, the Court unambiguously distinguished the facts of these cases: "Unlike the claims in *Krushnic* and *Virginia-Colorado*, the Land Commissioner's findings indicate that the present claims had not substantially met the conditions of § 28 respecting assessment work. Therefore we cannot say that *Krushnic* and *Virginia-Colorado* control this litigation." 400 U.S. at 57. We reject the "reasonably persistent" standard, applied by Judge Sweitzer, on the ground that it impermissibly and erroneously liberalizes the court's holding in *TOSCO*, despite the Supreme Court's express statement that the rule of *Krushnic* and *Virginia-Colorado* was to be confined to a narrow ambit.

We turn now to the contentions in each case above set forth. We find that the holding in Contest No. 658 is correct. Contestees stipulated that the assessment work of record is accurate, although incomplete (Tr. 20). As mentioned, the decision found that assessment work had been performed 14 or 15 of the 43 years between location and issuance of final certificate. John Savage's testimony was offered as evidence of additional work done not of record. That testimony establishes that contestees did some road work between 1954 and 1968. The assertion of considerable additional work arises from the witness' statements that he did additional work though some of the improvements were difficult to find (Dec., p. 38), although he did not attempt to allocate any expenditures expressly to the Compass claims (Dec., p. 39). It should be noted that the witness admitted that he could not tell how much additional work not of record has been done (Dec., p. 40), and that he did not know how much of the additional work was for the oil shale claims or the surrounding patented Timber and Stone Act claim (Dec., pp. 39, 41).

We hold that the contestant presented a prima facie case of lack of substantial compliance with 30 U.S.C. § 28 (1976). The burden then shifted to the contestees to show by a preponderance of evidence that substantial compliance with the assessment requirements had been made. *Hickel* v. *TOSCO*, *supra*. We agree with Judge Sweitzer that contestees' evidence preponderates over that adduced by the Government. Judge Sweitzer noted:

> Contestees' evidence in this regard may have been objectionable in part (but was received without objection) and it is not without ambiguity, for example, as to

just how much work would inure to the benefit of the Compass claims and for which years, and the surprising but unrebutted and unexplained statement that "there were affidavits of labor of one sort or another for every year from 1890 to 1950." But it is adequate, in the absence of even a scintilla of a contrary showing, to require a determination that Contestant has not met its burden.

(Dec., p. 42). We have noted above our disagreement with the Judge's allocation of the burden of proof. Nevertheless, in view of the failure of the contestant to either attack the credibility of this evidence or to submit more evidence in addition to that which established its prima facie case, we must hold that appellant in Contest No. 658 has preponderated over the Government's showings. Accordingly, we hold that contestees have shown substantial compliance with the requirements of 30 U.S.C. § 28 (1976), as explicated by the Supreme Court in *TOSCO*.

The decision in Contest No. 659 declaring the Carbon-Elizabeth claims null and void is affirmed. Contestees' evidentiary arguments in support of reversal are founded on the erroneous assumption that the Government bears the burden of proof and need not be considered further. We have also already disposed of the contention that 30 U.S.C. §§ 28 and 29 (1976) are to be read *in pari materia*. For the reasons hereinbefore discussed, the evidentiary record as to these claims does not support a finding that contestees have substantially performed assessment work as the term was construed in *TOSCO*, and Judge Sweitzer's decision is accordingly affirmed.

Regarding the Oyler claims in Contest No. 660, we find certain contradictions within the evidence, and reflected in the decision, which must be resolved against contestees. First, it is noted that the parties stipulated that certain mineral reports set forth all evidence of record concerning performance of assessment work. Exh. P–346. In addition, the mineral examination reports contain certain findings allocating the work among the four claims. Exh. P–346, pp. 6–8. It was incorrect for the Judge to substitute his inferences for the facts as stipulated. Assessment work issues are not to be adjudicated on the basis of inferences derived from previous "patterns" of conduct. Moreover, the inference is unjustified. Contrary to the Judge's conclusion, there is ample evidence to conclude that the "continuing pattern of performing the work" did not occur each year; such evidence is found in the facts as stipulated and as found by the Judge.

We note, for example, that the statement that affidavits of labor in the amount of $100 were filed for each claim in 1924 and 1925 (Dec., p. 46), directly contradicts the data set forth in the 1929 mineral report. We believe we are bound by the facts as stipulated for the years 1921–28, and to the extent that the decision is inconsistent with the following, it is reversed:

	No. 1	No. 2	No. 3	No. 4	Total
1921	$600.40	$600.40	$600.40	$600.40	$2,401.60
1922	52.80	----------	183.80	89.00	325.60
1923	346.25	64.20	319.58	82.30	812.33
1924	----------	----------	186.27	224.20	410.47
1925	----------	----------	370.05	144.40	514.45
1926	----------	40.00	----------	----------	40.00
1927	100.00	100.00	100.00	82.30	382.30
1928	100.00	100.00	----------	100.00	300.00
	1,199.45	904.60	1,760.10	1,322.60	5,186.75

Exh. P–346, p. 8.

As mentioned, the decision in Contest No. 660 relied in part on an historical sketch. Our reading of Exh. P–335 convinces us of the correctness of contestant's contentions that this document should be accorded little, if any, weight. We disagree with contestant's assertion that the document shows that no labor was done from 1932 to 1952, and conclude, rather, that work ceased in 1938 or 1939 (Exh. P–335, p. 15). We do agree, however, that the text of the narrative describes "work done on the land comprised of the placer oil shale claims in the Mt. Blaine group" (Exh. P–335, p. 17). As to the Oyler claims, "[i]t was the intention of the Index Company eventually to establish a plant on this site." *Id.* Moreover, the narrative was prepared, it appears, for use in a suit to quiet title to all claims held or formerly held by the Index Company. *Id.* An illegible signature appears over the names of the president and manager of the company, which was dissolved in 1939. It thus appears that there is merit in contestant's suggestion that this document is self-serving.

We think contestees have failed to establish substantial compliance with the requirements of 30 U.S.C. § 28 (1976), and accordingly, the Oyler claims are declared null and void.

Estoppel and Laches

The question of the applicability of estoppel arises in a number of different aspects in Judge Sweitzer's decision. In the text of the decision he found that under the doctrine expounded in *Atlantic Richfield Co.* v. *Hickel*, 432 F.2d 587, 592 (10th Cir. 1970), "an administrative determination running contrary to law will not constitute an estoppel against the federal government." Thus, he found that the Government was not estopped by either the *Shale Oil Co.*, 55 I.D. 287 (1935), or the pre-1972 regulations, to contest the oil shale claims for failure to substantially satisfy the requirements of 30 U.S.C. § 28 (1976) (Dec., pp. 48–53).

Addendum A to Judge Sweitzer's decision dealt with the question of reliance by the individual claimants on prior Departmental actions regarding the effect of the old assess-

ment work contests in light of the decisions in *Krushnic* and *Virginia-Colorado*. Judge Sweitzer found that all of the claimants, or their predecessors in interest had relied on Departmental assurances that the old contest proceedings were nullities.

Addendum B concerned the question of reliance by the claimants upon the prior actions of the Department regarding the need to perform annual assessment work. Judge Sweitzer found, in effect, that the individual claimants and their predecessors in interest had relied upon assertions of the Department that failure to perform assessment work was of no concern of the Department.

With regard to Addendum A, we note that the question of the legal efficacy of the old assessment work contests has been reserved by the Federal courts, and we will accordingly make no comments thereon. Insofar as Judge Sweitzer's findings of reliance in Addendum A are concerned, we find that these findings are supported by the record and concur therein.

Similarly, we agree with Judge Sweitzer that, even were estoppel available relating to the need to perform annual assessment work, the principle upheld in *Atlantic Richfield Co.* v. *Hickel*, *supra*, would prohibit the application of estoppel. We do not agree, however, with Judge Sweitzer's findings that the claimants, in deciding not to perform annual assessment work, relied on Departmental actions.

[5] The fundamental flaw in Judge Sweitzer's findings on this point is one which recurs throughout the contestee's arguments on estoppel. The simple fact is that contestees can point to no decision of any Federal court, or any formal decision or Instruction issued by the Department of the Interior that ever purported to hold that a mining claimant was not required under 30 U.S.C. § 28 (1976) to perform annual assessment work. The decisions in *Krushnic* and *Virginia-Colorado* dealt not with the question whether oil shale claimants were required to comply with the provisions of sec. 28, but whether the United States would be a beneficiary of a failure to perform the assessment work. Indeed, both *Krushnic* and *Virginia-Colorado* expressly noted that a mining claimant was required to perform labor of $100 annually for each claim. *See* 280 U.S. at 317; 295 U.S. at 645. The Departmental decisions and pronouncements to which contestees advert were of similar import.

Thus, contestees, in effect, are arguing that an equitable estoppel should lie because they knowingly violated an affirmative obligation under the law in reliance on the fact that they were immune from punishment. They are attempting to resort to equity to absolve themselves from the consequences of their willful violations of the mining law. Among the cardinal principles of equity, however, are the maxims that equity may be invoked only to do equity, and that one who seeks

equitable relief must do so "with clean hands." Appellants can show no equitable basis for the invocation of an estoppel to excuse their past failures to perform the annual assessment work mandated by 30 U.S.C. § 28 (1976).

[6] Regarding the defense of laches, Judge Sweitzer found that in the first instance the defense of laches is not available against the Government in cases involving public lands, citing *United States* v. *California*, 322 U.S. 19, 40 (1947), and secondly, that even were laches determined to be an available defense, it would clearly be circumscribed by the same limitations surrounding the doctrine of estoppel (Dec., pp. 53–54). We agree.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Judge Sweitzer in Contest No. 658, dismissing the complaint against the Southwest, the Northwest, the Northeast, and the Southeast placer mining claims is affirmed; the decision of Judge Sweitzer in Contest No. 659, holding that the Carbon placer mining claims Nos. 1 to 5, inclusive, and the Elizabeth placer mining claims Nos. 1, 2, and 4–12, inclusive, invalid is affirmed; and the decision of Judge Sweitzer in Contest No. 660, dismissing the complaint against the Oyler placer mining claims Nos. 1 to 4, inclusive, is reversed, and the Oyler Nos. 1 to 4 are hereby declared invalid.

DOUGLAS E. HENRIQUES
Administrative Judge

WE CONCUR:

EDWARD W. STUEBING
Administrative Judge

JAMES L. BURSKI
Administrative Judge

APPENDIX

In past years Congress has from time to time suspended the need to perform annual assessment work on unpatented mining claims. Generally, if not in all cases, a notice of intent to hold the claim was required. Periods of suspension were:

Jan. 1, 1893 to Dec. 31, 1893 (28 Stat. 6)

Jan. 1, 1894 to Dec. 31, 1894 (28 Stat. 114)

Jan. 1, 1913 to Dec. 31, 1913 (38 Stat. 235)

Jan. 1, 1917 to Dec. 31, 1918 (40 Stat. 343)

Jan. 1, 1919 to Dec. 31, 1919 (41 Stat. 279 & 354)

Jan. 1, 1931 to July 1, 1932 (47 Stat. 291 & 474)

July 1, 1932 to July 1, 1933 (48 Stat. 72)

July 1, 1933 to July 1, 1934 (48 Stat. 777)

July 1, 1934 to July 1, 1935 (49 Stat. 337)

July 1, 1935 to July 1, 1936 (49 Stat. 1238)

July 1, 1936 to July 1, 1937 (50 Stat. 306)

July 1, 1937 to July 1, 1938 (52 Stat. 1243)

July 1, 1941 to July 1, 1943 (56 Stat. 271)

May 3, 1943 to July 1, 1947 (57 Stat. 74)

June 30, 1947 to July 1, 1948 (61 Stat. 213)

June 17, 1948 to July 1, 1948 (62 Stat. 475)

July 1, 1948 to July 1, 1949 (62 Stat. 571)

July 1, 1949 to July 1, 1950 (63 Stat. 200 & 213)

In addition, personnel in military service were excused from doing assessment work for certain periods of the Spanish American War, World War I, and World War II. The respective acts are found in 30 Stat. 651, 40 Stat. 243, and 54 Stat. 1188.

The Act of July 3, 1942 (56 Stat. 647) provided for suspension of assessment work on claims withdrawn for national defense efforts in the prosecution of World War II.

APPEAL OF EYAK CORPORATION

4 ANCAB 277

Decided *June 30, 1980*

Appeal from decision of the Bureau of Land Management (BLM) AA–8447–A and AA–8447–B.

Affirmed and appeal dismissed.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction—Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third–Party Interests

Where the State of Alaska has issued patent to a third party on lands tentatively approved to the State under the Alaska Statehood Act, the proper forum to adjudicate the status of such patent is a court, and the Department lacks administrative jurisdiction over the issue.

2. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third–Party Interests

Contracts for the sale of real property, issued by the State of Alaska for lands in tentatively approved State land selections under the Statehood Act, are valid existing rights leading to the acquisition of title, protected by exclusion from conveyances to Native corporations under the Alaska Native Claims Settlement Act, as interpreted by Secretary's Order No. 3029 (43 FR 55287 (1978)).

3. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third–Party Interests—Alaska Native Claims Settlement Act: Withdrawals and Reservations: Withdrawals for Native Selection: State–Selected Lands

In the case of unlisted villages a period occurred, after enactment of the Alaska Native Claims Settlement Act and before the villages filed for eligibility, in which tentatively approved land selections of the State of Alaska were not yet withdrawn for potential village selections, and during this period the State could still create third-party interests in such lands.

4. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third–Party Interests—Alaska Native Claims Settlement Act: Withdrawals and Reservations: Withdrawals for Native Selection: State–Selected Lands

In the case of unlisted villages, third-party interests created by the State of Alaska on tentatively approved lands after enactment of the Alaska Native Claims Settlement Act are entitled to protection as valid existing rights provided such interests were created before the unlisted village applied for eligibility and lands were withdrawn for it.

APPEARANCES: Dennis P. James, Esq., and David J. Walsh, Esq., Moderow, Walsh, Johnson & James, on behalf of Appellant, Eyak Corp.; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

SUMMARY OF APPEAL

The Eyak Corp. objects to exclusion from its land conveyance of a number of patents and contracts for the sale of real property issued by the State of Alaska on lands selected and tentatively approved for conveyance to the State under the Alaska Statehood Act. Eyak contends that the State lacked authority to create such permanent third-party interests in lands to which the State had not itself received patent. Sec. 11(a)(2) of ANCSA prevents the State from creating third-party interests after Dec. 18, 1971, on tentatively approved State land selections withdrawn for selection by a Native village listed in ANCSA. However, the Board finds that this prohibition cannot apply in the case of an unlisted village until such village applies for eligibility and land is withdrawn for it. Where third-party interests leading to title are created under State law on TA'd lands after enactment of ANCSA, but before withdrawal of the land for selection by an unlisted village, such interests are valid existing rights as interpreted by Secretary's Order No. 3029, and are protected from conveyance to Eyak Corp. The Board finds that exclusion of these interests from conveyance to Eyak Corp. was correct.

JURISDICTION

The Alaska Native Claims Appeal Board pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

PROCEDURAL BACKGROUND

Eyak was an unlisted village which applied for eligibility in 1973. In July of 1973, PLO 5353 (38 FR 19825 (July 24, 1973)) withdrew lands for selection by Eyak, pending determination of its eligibility. The lands withdrawn were T. 15 S., R. 2 W., Copper River meridian. Eyak was certified as an eligible village Dec. 17, 1974.

This appeal, from a Bureau of Land Management decision to convey land to Eyak Corp., was timely filed July 27, 1978.

The Board on Dec. 26, 1978, in an order segregating lands in dispute in two companion appeals, noted that the lands in dispute in the present appeal did not need to be segregated from the conveyance to Eyak to allow prompt conveyance of undisputed lands, because the disputed lands were excluded from the conveyance to Eyak in the decision to convey. The order listed the excluded lands as a matter of information.

The Board on Sept. 21, 1978, suspended action on the appeal pending reconsideration by the Secretary of the Interior of Secretary's Order No. 3016 (Dec. 14, 1977) (85

I.D. 1 (1977)). The circumstances of this reconsideration must be understood in connection with the present appeal.

The issues raised by Eyak Corp. involve whether certain State created third-party interests (patents and contracts for the sale of lands) constitute valid existing rights, protected under ANCSA, and, if so, how such interests should be protected. The Board had, in two previous cases (*Appeal of Eklutna, Inc.*, 1 ANCAB 190, 83 I.D. 619 (1976) [VLS 75-10]; and *Appeals of State of Alaska and Seldovia Native Association, Inc.*, 2 ANCAB 1, 84 I.D. 349 (1977) [VLS 75-14/75-15]), ruled on issues involving such valid existing rights.

Expressing doubts about the validity of State issued patents of lands which have been tentatively approved but not patented to the State, the Board nevertheless in the *Seldovia* appeals, ruled:

> The effect of the issuance of a patent to public lands by the United States, even if issued by mistake or inadvertence, is to transfer the legal title from the United States and to end all authority and jurisdiction in the Department of the Interior over the lands conveyed. [Citations omitted.] As to the issue of determining jurisdiction, the Board accords a final patent issued to a third party by the State of Alaska prior to ANCSA the same dignity as a Federal patent. The proper forum to adjudicate the status of such an interest is in a judicial proceeding and the Board lacks jurisdiction to decide the issue.

Appeals of State of Alaska and Seldovia Native Association, Inc., 2 ANCAB 1, 58-59, 84 I.D. 349, 375 (1977) [VLS 75-14/75-15].

The Secretary of the Interior, in Secretary's Order No. 3016, *supra*, subsequently adopted certain policies on the interpretation of valid existing rights under ANCSA which, as to appeals not yet decided, effectively reversed portions of the Board's decision in the *Eklutna* and *Seldovia* cases. Following the issuance of Secretary's Order No. 3016, *supra*, the Secretary agreed to reconsider this Order after accepting briefs from interested parties. The Board therefore suspended action on all appeals involving valid existing rights pending the reconsideration.

The reconsidered Order was designated Order No. 3029, and was published in the Federal Register. (43 FR 55287 (1978)). The Board is bound by published Secretarial statements of policy.

Upon publication of Order No. 3029, *supra*, the Board on Dec. 4, 1978, ended suspension of the appeal and directed the parties to file any further briefing they wished the Board to consider on whether interests asserted by the appellant constituted valid existing rights as interpreted by Order No. 3029, *supra*. Upon motion by BLM, the Board, on Dec. 20, 1978, allowed the BLM 30 days after filing of the appellant's statement of reasons in which to respond. The appellant did not file a statement of reasons. On July 18, 1979, the Board issued an order directing filing of the statement of reasons and scheduling briefings. The order stated.

> 1. Eyak Corporation shall, within fifteen (15) days from the date of this

Order, either file a statement of reasons and standing as required by regulations in 43 CFR 4.903(b), or, in the alternative, advise the Board whether it considers its reasons for appeal to have been adequately briefed in its Notice of Appeal. If the appellant does not respond to this Order within fifteen (15) days, the Board will treat appellant's Notice of Appeal as its statement of reasons in deciding the appeal.

Eyak Corp. has filed nothing further. BLM accordingly filed a response to the appellant's Notice of Appeal.

BLM contends that the Secretary, in Order No. 3029, *supra*, found that State-created third-party interests in tentatively approved land pursuant to the Alaska Statehood Act, 72 Stat. 339, 48 U.S.C. Prec. § 21 (1958), were valid existing rights. BLM further references regulations in 43 CFR 2650.3–1(a) which provide:

> Pursuant to sections 14(g) and 22(b) of the act, all conveyances issued under the act shall exclude any lawful entries or entries which have been perfected under, or are being maintained in compliance with, laws leading to the acquisition of title, but shall include land subject to valid existing rights of a temporary or limited nature such as those created by leases (including leases issued under section 6(g) of the Alaska Statehood Act), contracts, permits, rights-of-way, or easements.

DECISION

The Appellant, Eyak Corp., objects to the exclusion from its land conveyance of a number of patents and contracts for the sale of real property issued by the State of Alaska. The lands in which the State created these third-party interests were State land selections which had been tentatively approved under the Alaska Statehood Act, *supra*. The Eyak Corp. contends that the State of Alaska exceeded its authority under § 6(g) of the Statehood Act, *supra*, by creating permanent third-party rights on land selections which were only tentatively approved, but not yet patented, to the State.

BLM asserts that since Eyak's appeal is expressly limited to rights leading to acquisition of title, *i.e.*, patents and contracts for the sale of real property, BLM properly excluded these interests pursuant both to the above regulations and to Order No. 3029, *supra*.

The Board agrees with BLM.

[1] As to State issued patents, the Board's ruling in the *Seldovia* appeals remains undisturbed by the Secretary in Order No. 3029, *supra*. Where the State of Alaska has issued patent to a third party on lands tentatively approved to the State under the Alaska Statehood Act, *supra*, the proper forum to adjudicate the status of such a patent is a court, and the Department lacks administrative jurisdiction over the issue.

[2] Contracts for the sale of real property, issued by the State of Alaska for lands in tentatively approved State land selections under the Statehood Act, *supra*, are valid existing rights leading to the acquisition of title, protected by exclusion from conveyances to Native corporations, under ANCSA as interpreted by Order No. 3029, *supra*.

The Solicitor's Opinion on which the Secretary relies in Order No.

3029, *supra*, adopts the position that State-created third-party interests are, in fact, issued under Federal law, *i.e.*, the Alaska Statehood Act, *supra*, rather than under individual land disposal statutes enacted by the State. He states:

> First, the authority of the State to create third party interests in tentatively approved (T.A.'d) lands comes from section 6(g) of the Statehood Act, quoted in pertinent part above. Although the State has exercised this authority through State legislation which defines the terms on which persons may acquire leases, etc., the Congress, in ANCSA, clearly considered such leases to be issued under Federal law, namely the Statehood Act. Section 11(a)(2), for example, withdraws T.A.'d land "from the creation of third party interests by the State under the Alaska Statehood Act." Section 14(g), as already stated, refers to leases "issued under section 6(g) of the Alaska Statehood Act." [43 FR 55288 (1978).]

The Solicitor also asserts that the listing of rights to be protected, in various sections of ANCSA, is not exhaustive. The Solicitor concluded "the department's regulations have construed 'valid existing rights' under ANCSA to include rights perfected or maintained under State as well as Federal laws leading to the acquisition of title."

Accordingly, the Board's ruling in the *Seldovia* and *Eklutna* cases that valid existing rights to be excluded from conveyances to Native corporations must be those rights created under Federal law and leading to acquisition of title is modified, insofar as it did not include State-created interests leading to fee title, by Order No. 3029, *supra*.

Taking the position that protection for State-created valid existing rights is not limited to that offered by § 14(g) of ANCSA, the Solicitor states,

> The fact that Congress expressly referred only to leases issued by the State is not persuasive evidence that Congress intended no other State-created interests to be protected. The reasons for Congress' special emphasis on State leases is entirely understandable.
>
> The House Committee report reflects Congress' concern that a lease issued by the State which on its terms was conditional on the issuance of a patent to the State not be terminated by virtue of the Native Selection. H.R. Report No. 92-523, 92d Cong., 1st Sess. (1971), p. 9.
>
> It is well-known that ANCSA was the subject of intense concern to the oil and gas industry which had mineral leases on State selected lands. It is therefore not surprising that Congress paid special attention to State-issued leases. But that is not that is not [sic] to say that Congress was unaware of or unconcerned with State issued patents, which were equally conditional on the issuance of a federal patent to the State. Thus the House Committee report, *supra*, states: "Section 11(i) protects all valid rights * * *." If it had intended to protect only leases or only rights of a temporary nature the use of the word "all" would seem inappropriate. [43 FR 55289 (1978).]

Although it was not raised by the parties, the Board notes an additional issue in this appeal, arising from the fact that Eyak is an unlisted village.

Sec. 11(a)(2) of ANCSA withdraws TA'd land in the vicinity of Native villages "from the creation of third party interests by the State under the Alaska Statehood Act."

Order No. 3029, *supra*, concluded that third-party interests created by the State in TA'd lands *prior to enactment of ANCSA* were valid existing rights, protected from Native selection. In this appeal, the disputed patents and contracts of sale were not issued prior to enactment of ANCSA. (Dec. 18, 1971.) They were not executed until 1974, and therefore appear not to be valid existing rights.

However, Eyak was an unlisted village; that is, Eyak was not one of the 205 villages listed in § 11(b)(1) of ANCSA as "Native villages subject to this Act." Eyak was certified as a village eligible for benefits under ANCSA under the provisions of § 11(b)(3) and implementing regulations in 43 CFR 2651.2(a)(6), which allowed an unlisted village to file an application for a determination of eligibility with the Bureau of Indian Affairs (BIA) by Sept. 1, 1973.

This affects the date on which land withdrawals were made for village selections. Sec. 11(a)(3)(B) of ANCSA requires land in the vicinity of each village to be withdrawn for possible village selection within 60 days from the date of enactment of ANCSA, Dec. 18, 1971, "or as soon thereafter as practicable." Land withdrawals for listed villages could, at least theoretically, be made within the 60-day period because the location of the villages was known on the date of enactment. In the case of unlisted villages, however, land withdrawals could not be made until the village applied to BIA for an eligibility determination; BIA was then required to forward the application, which was to identify the township in which the village was located, to BLM. Regulations in 43 CFR 2651.2(a)(7) (1979) provide, "The receipt of the selection application for filing by the Bureau of Land Management shall operate to segregate the lands in the vicinity of the village as provided in sections 11(a)(1) and (2) of the act."

As noted, withdrawal provisions in § 11(a)(2) of ANCSA provide:

> All lands located within the townships described in subsection (a)(1) hereof that have been selected by, or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act are withdrawn, *subject to valid existing rights*, from all forms of appropriation under the public land laws, * * * *and from the creation of third party interests by the State under the Alaska Statehood Act.* (Italics added.)

Thus, once TA'd land was withdrawn for selection by a village, the State could not have legally created any third-party interests in that land, regardless of selection and tentative approval under the Statehood Act, *supra*.

[3] However, land was not uniformly withdrawn for unlisted villages within 60 days after the enactment of ANCSA, as it was for those villages listed in the Act. A period occurred after enactment of ANCSA and before unlisted villages filed their applications for eligibility, in which tentatively approved State land selections surrounding unlisted villages was not yet withdrawn for potential village selections; during this period, the State could still create third-party interests in such lands.

[4] Thus, in the case of land surrounding an unlisted village, third-party interests created by the State of Alaska on tentatively approved lands *after* enactment of ANCSA could also be entitled to protection as valid existing rights provided such interests were created *before* the unlisted village applied for eligibility and the surrounding lands were withdrawn for it. Review of the record indicates that this occurred in the case of Eyak.

The decision here appealed recites that on Aug. 27, 1973, the Village of Eyak filed an application for a determination of its eligibility as an unlisted village. However, it appears that Eyak prior to this date advised BLM of its intention to apply for eligibility, because in July of 1973 PLO 5353, *supra*, was issued and published in the Federal Register, withdrawing lands for selection under ANCSA pending determinations of eligibility of several unlisted Native villages, including Eyak.

Briefs filed by BLM and the State of Alaska indicate that all patents and contracts of sale disputed in this appeal were issued by the State subsequent to withdrawal of the disputed lands for selection by the unlisted Village of Eyak subject to a determination of its eligibility.

However, the State asserts that when it received tentative approval to the lands, in July 1972, the lands were already subject to existing Forest Service recreational leases, dating from the 1950's and 1960's. Pursuant to State law (Alaska Stat. § 38.05.068) holders of valid Forest Service leases had a preference right to purchase from the State those lands which had been leased to them. Accordingly, the Department of Natural Resources in April 1973, offered the Forest Service lessees the opportunity to file applications under the preference right provision. All applications were filed with the State on Apr. 30, 1973, prior to the withdrawal of lands for Eyak. Therefore, the State argues, although the contracts of sale based on these applications were not executed until 1974, after withdrawal of land for Eyak, the Forest Service lessees had valid existing rights prior to this time based on their occupancy pursuant to valid Forest Service leases and their applications for preference right under State statute.

The Board concludes that within the contemplation of Order No. 3029, *supra*, valid existing rights in the leases in question, predecessors to the contracts of sale and patents here in dispute, were created pursuant to State law prior to the withdrawal of land for the unlisted Native Village of Eyak.

Accordingly, the Board finds that the disputed patents and contracts for the sale of real property, issued by the State of Alaska for lands tentatively approved but not yet patented to the State under the Statehood Act, *supra*, within the contemplation of Order No. 3029, *supra*, are valid existing rights leading to fee title which must be excluded from conveyances to Native corporations under ANCSA, and

BLM Decision AA–8447–A and AA–8447–B is hereby affirmed.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

APPEAL OF BRUCE McALLISTER

4 ANCAB 294

Decided *June 30, 1980*

Appeal from the Decision of the Bureau of Land Management AA–6701, 42 FR 41929 (Aug. 19, 1977).

Reversed in part.

1. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Decisions

The Board is bound by statements of policy made by the Secretary of the Interior and contained in a published Departmental Manual Release or in a Secretarial Order published in the Federal Register.

2. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third–Party Interests

Lands tentatively approved for conveyance under the Alaska Statehood Act and leased by the State of Alaska pursuant to its open-to-entry lease program prior to enactment of the Alaska Native Claims Settlement Act must, pursuant to Secretary's Order No. 3029 (43 FR 55287 (1978)), be excluded from conveyance under ANCSA as valid existing rights leading to the acquisition of title.

3. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third–Party Interests

The policy expressed in Secretary's Order No. 3029 (43 FR 55287 (1978)), is applicable to all lands still within the Department's jurisdiction, even if the decision to convey such lands pursuant to the Alaska Native Claims Settlement Act was issued by the Bureau of Land Management prior to publication of Order No. 3029.

4. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third–Party Interests

Tentative approval of land selections by the State of Alaska under the Statehood Act was rescinded by the Bureau of Land Management to permit conveyance of the same lands to a Native corporation under the Alaska Native Claims Settlement Act. Subsequently, Secretary's Order No. 3029 (43 FR 55287 (1978)) found that third-party interests leading to fee title, created by the State in such lands, were valid existing rights which must be excluded from conveyance to the Native corporation. Accordingly, BLM must reinstate tentative approval of the State's selection of such lands so that the State is able to grant title to such third parties as contemplated by Order No. 3029.

APPEARANCES: Charles Cranston, Esq., Gallagher, Cranston & Snow, on behalf of appellant; A. Robert Hahn, Esq., Hahn, Jewell & Stanfill, on behalf of Seldovia Native Association, Inc.; James N. Reeves, Esq., and Shelley J. Higgins, Esq., on behalf of the State of Alaska; James D. Linxwiler, Esq., on behalf of Cook Inlet Region, Inc.; Andrew R. Sarisky, Esq., on behalf of the Kenai Peninsula Borough; John M. Allen, Esq., and M. Francis Neville, Esq., Office of the Regional Solicitor, on behalf of the Bureau of Land Management.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

SUMMARY OF APPEAL

This appeal involves the question of whether an open-to-entry lease issued by the State of Alaska prior to enactment of the Alaska Native Claims Settlement Act (ANCSA) on lands tentatively approved to the State but subsequently withdrawn by § 11(a)(2) of ANCSA for possible Native selection is protected under ANCSA. The Board finds the question is answered in the affirmative by Secretary's Order No. 3029; that the Board is bound by published Secretarial Orders; and that Order No. 3029 is applicable to all lands still within the Department's jurisdiction. The Board concludes that the open-to-entry lease here appealed must be excluded from conveyance to the Native corporation, and that the Bureau of Land Management must reinstate tentative approval of the State's selection of the land underlying the lease so that the State is able to grant title to the lessee as contemplated by Order No. 3029.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and Decisions reversing in part the above-designated decision of the Bureau of Land Management.

PROCEDURAL BACKGROUND

On June 13, 1962, the State filed a selection application for lands near the Native Village of Seldovia. On Jan. 3, 1964, the Bureau of Land Management (BLM) issued a decision to tentatively approve conveyance to the State of certain lands within T. 8 S., R. 14 W., Seward meridian. Prior to Dec. 18, 1971, the State issued open-to-entry (OTE) lease ADL 50791 for a tract within the subject lands. On Dec. 18, 1971, § 11 of ANCSA withdrew for Native selection the lands surrounding the Village of Seldovia, including lands in the preceding State selection. On Feb. 11, 1974, Seldovia filed village selection application AA–6701–A for lands located near the village, including lands within the prior State selections.

Without adjudicating Seldovia's selection application, the BLM on Oct. 3, 1974, vacated the tentative approval previously given for conveyance of the subject lands to the State. The Board, in *Appeal of the State of Alaska*, 1 ANCAB 281, 83 I.D. 685 (1976) [VLS 75–8], vacated the BLM decision and remanded the cause to BLM for further proceedings, on the grounds that BLM's decision had been based on the mere filing of a selection application by Seldovia, and was thus premature.

On Aug. 16, 1977, the BLM issued its second decision to issue

conveyance of the subject lands to Seldovia. The lands which had been State selected and tentatively approved were found to have been properly selected under village selection application AA–6701–A. Accordingly, the tentative approval previously given for conveyance of lands to the State was rescinded in part, and the underlying State selection applications rejected in part.

In its decision to issue conveyance, the BLM found that the subject lands

> do not include any lawful entry perfected under or being maintained in compliance with laws leading to acquisition of title.
>
> In view of the foregoing, the surface estate of the following described lands * * * is considered proper for acquisition by Seldovia Native Association, Inc. and is hereby approved for conveyance pursuant to section 14(a) of the Alaska Native Claims Settlement Act.

Continuing, the BLM provided:

> The grant of lands shall be subject to:
>
> * * * * * * *
>
> 5. The following third party interests, created and identified by the State of Alaska, as provided by section 14(g) of ANCSA, all of which are located in T. 8 S., R. 14 W., Seward Meridian:
>
> a. Open-to-entry leases, each approximately 5 acres in size.
>
> * * * * * * *
>
> (7) ADL 50791 located in NE¼NE¼ of section 23 and NW¼NW¼ of section 24.

On Sept. 19, 1977, Bruce McAllister, lessee under lease number ADL 50791, filed his Notice of Appeal from the above-referenced decision of the BLM. Mr. McAllister appealed the BLM decision on the grounds that (1) the BLM erred in rejecting the State's selection application, and (2) the BLM's decision granting lands to Seldovia subject to appellant's OTE lease in unclear at best, inconsistent at worst.

Appellant prayed that the Board:

(1) Reverse the BLM decision and order that Seldovia has no right, title or interest in and to the land described in OTE lease ADL 50791,

(2) or, in the alternative, to interpret the BLM decision as declaring that Seldovia takes title to the described land subject to appellant's right to exercise his option to acquire fee title thereto.

Following appellant's filing of the Notice of Appeal, the Secretary of the Interior issued Secretary's Order No. 3016, 85 I.D. 1 (Dec. 14, 1977). Secretary's Order No. 3016, *supra*, was a response to and partial reversal of the position taken by the Board in *Appeals of State of Alaska and Seldovia Native Association, Inc.*, 2. ANCAB 1, 84 I.D. 349 (1977) [VLS 75–14/75–15]. The Board had held that, pursuant to ANCSA, land previously tentatively approved for conveyance to the State was to be conveyed to Native corporations subject to OTE leases issued by the State, but that at the end of the lease term, the lessee's rights would end, and the lessee could not enforce the option provided by Alaska statute to receive patent to the land because title to the land would have passed to the Native corporation upon conveyance and the State no longer would have title to grant to the lessee.

In Secretary's Order No. 3016, *supra*, the Secretary determined that State of Alaska OTE leases

issued prior to the effective date of ANCSA on lands tentatively approved to the State, together with the lessee's statutory option to purchase the lands, were valid existing rights protected pursuant to § 14 (g) of ANCSA. The Secretary declared that conveyances to Native corporations should be issued subject to such OTE leases, and that the purchase option could subsequently be exercised by the lessee against the grantee Native corporation.

On Mar. 24, 1978, this Board was notified that the Secretary had decided to reconsider Secretary's Order No. 3016, *supra*. Pending reconsideration, the Board on Mar. 29, 1978, suspended further briefing in this appeal.

On Nov. 20, 1978, the Secretary of the Interior issued Order No. 3029, 43 FR 55287 (1978). Order No. 3029, *supra*, reaffirmed the Secretary's position in Secretary's Order No. 3016, *supra*, that rights created pursuant to the State of Alaska's OTE lease program are valid existing rights within the meaning of ANCSA. Revising his earlier position, though, that conveyances of land under ANCSA should be issued subject to previously-issued OTE leases, the Secretary declared that land covered by such leases should be excluded from conveyances to Native corporations. Also, the Secretary referred to the Solicitor the question of whether the Order should be applied retroactively to decisions of this Board and of the BLM issued prior to publication of Order No. 3029, *supra*.

On Dec. 4, 1978, the Board terminated the suspension of action in this appeal and directed all parties to file, within thirty (30) days from receipt of its order, any further briefing. Seldovia, claiming that this appeal would be directly affected by the Solicitor's forthcoming ruling on retroactivity, requested an extension of time for final briefing. Given the procedural complexity of Order No. 3029, *supra*, as it affected the conveyance of land to Seldovia, and in an effort to insure that all OTE leaseholders would be accorded uniform treatment in the application of Order No. 3029, *supra*, the Board granted an extension of time in which to file a final brief until thirty days after the Solicitor's ruling on retroactivity.

The issue of retroactivity was decided Mar. 27, 1980. By publication of Departmental Manual Release Number 2246, 601 DM2, the Secretary decided that the policy set forth in Order No. 3029, *supra*, would be applied retroactively. The Secretary adopted the memorandum of the Solicitor dated June 2, 1979 (attached as Appendix 3 to 601 DM 2), as the position of the Department and decided that the policy stated in Order No. 3029, *supra*, would apply to all land still within the Department's jurisdiction.

The Board, on May 9, 1980, orddered the record of the appeal closed as of June 9, 1980, but allowed the filing of additional briefing prior to State, and the appellant each filed an additional brief pursuant to the Board's order.

DECISION

[1] The Board has previously held that it is bound by statements of Secretarial policy contained in a Secretarial Order published in the Federal Register. *Appeal of Ouzinkie Native Corp.*, 4 ANCAB 3, 86 I.D. 618 (1979) [VLS 78-7]. The Board is also bound by statements of policy made by the Secretary and contained in a published Departmental Manual Release.

[2] Thus, the Board is bound by the Secretarial policy expressed in Order No. 3029, *supra*, and in Departmental Manual Release Number 2246, *supra*, which policy is dispositive of this appeal. Specifically, lands tentatively approved for conveyance under the Alaska Statehood Act, July 7, 1958, 72 Stat. 339, 48 U.S.C. Prec. § 21 (1958), and leased by the State pursuant to its OTE lease program prior to enactment of ANCSA must, pursuant to Order No. 3029, *supra*, be excluded from conveyance under ANCSA as valid existing rights leading to the acquisition of title. Further, the OTE lessees are not precluded by the ANCSA conveyance from receiving patent for the leased land from the State.

[3] This policy is applicable to all lands still with in the Department's jurisdiction, even if the decision to convey such lands under ANCSA was issued prior to publication of Order No. 3029, *supra*.

[4] Tentative approval of land selections by the State of Alaska under the Statehood Act, *supra*, was rescinded by BLM to permit conveyance of the same lands to Seldovia under the Alaska Native Claims Settlement Act. Subsequently, Order No. 3029, *supra*, found that third-party interests leading to fee title, created by the State in such lands, were valid existing rights which must be excluded from conveyance to the Native corporation. Accordingly, BLM must reinstate tentative approval of the State's selection of such lands so that the State is able to grant title to such third parties as contemplated by Order No. 3029, *supra*.

ORDER

It is therefore Ordered that the decision of the Bureau of Land Management here appealed is reversed to the following limited extent:

(a) The BLM's rejection of State of Alaska selection application A-057388 is reversed insofar as the rejection applies to lands covered by OTE lease ADL 50791 issued by the State of Alaska.

(b) Lands covered by OTE lease ADL 50791 shall be excluded from those lands to be conveyed to Seldovia Native Association, Inc.

All pending motions of the parties before the Board in this appeal not hereby addressed are denied.

The Bureau of Land Management is hereby directed to take action consistent with this decision.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

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